156-208

# RECORD, CASE No. 14,676.

156-208

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., ~~1202~~. 765 ~~206~~ 191

JONATHAN LINDSAY, JORDAN LONGMIRE, MARY LONGMIRE, ET AL., PLAINTIFFS IN ERROR,

*vs.*

JANE BURGESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

**FILED JUNE 8, 1891.**

# RECORD, CASE No. 14,676.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., 1202.

JONATHAN LINDSAY, JORDAN LONGMIRE, MARY LONGMIRE, ET AL., PLAINTIFFS IN ERROR,

*vs.*

JANE BURGESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.


| | Original. | Print. |
|---|---|---|
| Declaration | 1 | 1 |
| Prosecution bond | 2 | 1 |
| Summons | 3 | 2 |
| Marshal's return | 4 | 3 |
| Plea | 5 | 3 |
| Bill of exceptions | 5 | 4 |
| Evidence for plaintiff | 5 | 4 |
| Grant from State of Tennessee to English *et al.*, August 28, 1845 | 6 | 4 |
| Deposition of Jane Burgess | 7 | 5 |
| Evidence for defendant | 13 | 8 |
| Testimony of John Jennings | 13 | 9 |
| Exhibit B—Deed from Jehu Branham to Laban Sharp, December 5, 1854 | 15 | 10 |
| D—Sheriff's deed to Myers *et al.*, December 8, 1845 | 17 | 11 |
| Testimony of Jonathan L. Lindsay | 20 | 13 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1891.

| | Original. | Print. |
|---|---|---|
| Exhibit E—Title bond from Peterson *et al.* to Douglas, March 10, 1842 | 21 | 14 |
| F—Deed from Douglas to Johnson, March 13, 1860 | 22 | 15 |
| Testimony of John Myers | 25 | 16 |
| Exhibit G—Deed from Isaac Myers to John Myers *et al.*, September 27, 1881 | 25 | 16 |
| Deed from Kincaid to Myers, May 22, 1849 | 29 | 19 |
| Testimony of Amos Jordan | 33 | 22 |
| Grant from State of Tennessee to Branham, October 26, 1848 | 36 | 24 |
| Testimony of John Bowman | 37 | 25 |
| William H. Sharp | 37 | 25 |
| William Allen | 38 | 26 |
| Isaac Ford | 38 | 26 |
| William Rutherford | 40 | 27 |
| Richard Johnson | 43 | 29 |
| Hezekiah Bruce | 45 | 30 |
| W. R. Myers | 46 | 31 |
| A. J. Peterson | 46 | 31 |
| J. H. Reid | 46 | 31 |
| John Myers | 47 | 31 |
| Exhibit I—Deed from Douglas to Johnson, March 13, 1860 | 47 | 32 |
| Evidence for plaintiff in rebuttal | 49 | 33 |
| Testimony of William Rutherford, Jr. | 49 | 33 |
| L. C. Ayers | 50 | 34 |
| James Campbell | 52 | 35 |
| John Campbell | 53 | 35 |
| Abner Rutherford | 54 | 36 |
| Exhibit J—Deed from W. N. Rutherford to Abner Rutherford, November 30, 1881 | 55 | 36 |
| Testimony of Abner Rutherford (continued) | 57 | 38 |
| James Gaylor | 58 | 38 |
| P. P. Baird | 59 | 39 |
| Testimony of A. O. Johnson | 60 | 40 |
| Ben. Johnson | 62 | 41 |
| Exhibit K—Grant from State of Tennessee to Richardson, September 21, 1836 | 63 | 42 |
| L—Copy of Jehu Branham entry, April 6, 1846 | 65 | 43 |
| Admission as to value of land in controversy | 65 | 43 |
| Charge to jury | 66 | 43 |
| Judge's certificate to bill of exceptions | 76 | 50 |
| Agreement as to bill of exceptions | 76 | 50 |
| Verdict and judgment | 76 | 50 |
| Order overruling motion for new trial | 79 | 52 |
| Bond | 80 | 52 |
| Order calling jury | 81 | 53 |
| Clerk's certificate | 82 | 54 |
| Citation and proof of service of same | 83 | 54 |
| Writ of error | 84 | 55 |
| Return on writ of error | 85 | 55 |
| Waiver of assignment of errors in record | 87 | 56 |

1 *Declaration. Filed April 20th,* 1889.

UNITED STATES OF AMERICA,
*Northern Division, Eastern District of Tennessee.*

Circuit Court, July Term, 1889.

Jane Burgess, a resident of the State of Missouri, by attorneys, complains of Jonathan Lindsay, Jordan Longmire and wife, Mary Longmire; Frank Richardson and wife, Elizabeth Richardson; Robert Mullens and wife, Emily Mullens; D. P. Condry and wife, Louisa Condray; Silas Sharp, C. W. Sharp, E. F. Wheeler and wife, O. E. Wheeler; Wm. H. Sharp, Annie Miller, John Myers, Archibald Myers, D. F. Myers, Hiram P. Johnson, J. Stoddard Johnson, trustee; Jerry Campbell, Anderson Stevens, P. P. Baird, David Baird, Wm. Walden, John Jordan, Ben. Waldens, Geo. Barley, Wm. Baird, Geo. Baird, Wm. Johnson, James Johnson, and Big Creek Gap Coal & Iron Company, a body corporate, all citizens and residents of said northern division of eastern district of Tennessee, of a plea of trespass in ejectment to her damage five thousand dollars—

For that the plaintiff being seized in fee and possessed of the following tract of land lying and being in the county of Campbell, State of Tennessee and district aforesaid, bounded as follows: Beginning *on* a white oak on the north side of Cumberland mountain near Joshua English's corner of a 100-acre survey, thence south 45 deg. west three hundred and eighty-five poles to a white oak by the side of a path below Morgan's old mill; the same course five hundred and eighty poles to a stake on the north side of the mountain; then north 20 deg. west nine hundred and sixty poles to a black oak on the east side of Hickory creek; thence north down the creek
2 two hundred poles to a large white oak on the east side of said creek; thence north 45 deg. east nine hundred poles to a stake and pointers on the Rock Creek mountain; thence south 20 deg. east eleven hundred and ten poles to the beginning, and being so possessed the defendants, on the 1st day of January, 1889, with force and arms, broke and entered her close and ejected her to her damage five thousand dollars; wherefore she sues, etc.

WASHBURN & TEMPLETON,
*Att'ys for Plaintiffs.*

Endorsed: No. 856. Declaration. Jane Burgess *vs.* Jonathan Lindsay *et al's.* Filed April 20th, 1889. H. H. Taylor, clerk, by J. T. Carter, D. C. Washburn & Templeton, att'ys.

*Prosecution Bond.*

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSAY *et als.*

Know all men by these presents that we, Jane Burgess and Washburn & Templeton, are held and firmly bound unto Johnathan Lindsay, Jordan Longmire and wife, *et al.* in the penal sum of five hundred dollars; to the payment whereof we bind ourselves and each of us and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands on this the 20th day of April, 1889.

The condition of this bond is such that the said Jane Burgess has commenced suit against said Jonathan Lindsay and divers others for ejectment:

Now, if the said Jane Burgess shall prosecute said suit with effect or on failure thereof pay and satisfy all costs that may be adjudged against said plaintiff in said cause or on failure of said de-
3 fendant, if convicted, to pay and satisfy all costs, if the said plaintiff shall pay the same, then this bond to be void; otherwise to remain in full force and virtue.

JANE BURGESS, [SEAL.]
By WASHBURN, *Att'y.* [SEAL.]
WASHBURN & TEMPLETON, *Sureties.* [SEAL.]

Attest: J. T. CARTER, *D. C.*

Endorsed: No. 856. Prosecution bond. Jane Burgess *vs.* Jonathan Lindsay *et al.* Filed 20 day of April, 1889. H. H. Taylor, clerk, by J. T. Carter, D. C.

*Summons.*

The President of the United States of America to the marshal of the eastern district of Tennessee, Greeting:

You are hereby commanded to summon Jonathan Lindsay, Jordan Longmire and wife, Mary; Frank Richardson and wife, Elizabeth; Robert Mullins and wife, Emily; D. P. Condray and wife, Louisa; Silas Sharp, C. W. Sharp, E. F. Wheeler and wife, O. E. Wheeler; Wm. H. Sharp, Anna Miller, John Myers, Archibald Myers, D. F. Myers, Hiram P. Johnson, J. Stoddard Johnson, trustee; Jerry Campbell, Anderson Stevens, P. P. Baird, David Baird, Wm. Walden, John Jordan, Ben. Walden, Goe. Barley, Wm. Baird, Geo. Baird, Wm. Johnson, James Johnson, John Jennings, and Big Creek Gap Coal & Iron Co., if to be found in your district, to be and appear before the judges of the United States circuit court, in the sixth circuit, for the eastern district of Tennessee, at the Federal court rooms in Knoxville, in said State, on the 2nd Monday in July

next, then and there to answer Jane Burgess of a plea wherefore you entered her close and ejected her to her damage five thousand dollars.

4 Herein fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 20th day of April, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 113th.

[SEAL.] H. H. TAYLOR, *Clerk.*

Endorsed: Come to hand when issued and executed on the following, to wit: Jonathan Lindsay, Jordan Longmire and wife, Mary Longmire; Frank Richardson and wife, Elizabeth Richardson; Robert Mullins and wife, Elimv Mullins; D. P. Condray and wife, Louisa Condray; Silas Sharp, C. W. Sharp, E. F. Wheeler and wife, O. E. Wheeler; Wm. H. Sharp, Anna Miller, John Myers, Archibald Myers, D. F. Myers, H. P. Johnson, J. Stoddard Johnson, trustee; Jerry Campbell, Anderson Stevens, P. P. Baird, David Baird, Wm. Walden, John Jordan, Ben. Walden, Geo. Barley, Wm. Baird, Geo. Baird, Wm. Johnson, James Johnson, John Jennings, and Big Creek Gap Coal & Iron Co., a body corporate, all citizens and residents of Campbell and Claiborne counties, and leaving a copy of summons and declaration with each of them in said counties on May 4th, 6th, 7th, and 8th, 1889. J. T. Peoples, dep. U. S. mar. No. 856. Janes Burgess *vs.* Jonathan Lindsay *et als.* Summons. This summon was issued on the 20th day of April, 1889. H. H. Taylor, clerk. Washburn & Templeton, attorneys. Campbell and Claiborne counties.

Marshal's costs:

| | |
|---|---|
| Officer, T. J. Peoples. | |
| 206 miles at 6c. | $12 36 |
| 32 summons at $2. | 64 00 |
| 32 copies od declaration at $2 | 64 00 |
| Total | $140 36 |

Filed May 14, 1889. H. H. Taylor, clerk.

5 *Plea.*

In the Circuit Court of the United States, at Knoxville, Tenn., July Term, 1889.

JANE BURGESS
*vs.*
JONATHAN LINDSAY *et al.*

Come the defendants and for plea to the plaintiff's declaration in this case say they are not guilty in manner and form as therein al-

leged, and of this they put themselves upon the country and demand a jury to try the issue.

HENDERSON & JOUROLMON,
SAWYER & REID, *Atty's for Def'ts.*

And plaintiff also.

WASHBURN & TEMPLETON, *Att'ys.*

Endorsed: No. 856. Jane Burgess *vs.* Jonathan Lindsay *et al.* Plea. Filed July 9, 1889. H. H. Taylor, clerk, by J. T. Carter, D. C.

*Bill of Exceptions.*

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSAY & Others.

Upon the trial of this cause, before the Hon. Howell E. Jackson and a jury of the district, the following proceedings were had:

After reading the pleadings the following evidence was introduced, and was all the material evidence introduced.

Plaintiff read a copy of the grant from the State in the words and figures following:

6 No. 25338.

State of Tennessee to all to whom these presents shall come, Greeting:

Know ye that, in consideration of an entry made in the entry taker's office of Campbell county, No. 843, dated the 2nd day of August, 1836, by Joshua English, Samuel T. Burgess, and Joseph Peterson, there is granted by the State of Tennessee unto the said Joshua English and others and their heirs a certain tract of land, containing five thousand acres, lying in the county aforesaid, beginning *on* a white oak on the north side of Cumberland mountain, near said English's corner of a 100-acre survey; then south forty-five west three hundred and eighty-five poles to a white oak by the side of the path below Morgan's old mill; the same course five hundred and eighty poles to a stake on the north side of the mountain; then north twenty west nine hundred and sixty poles to a black oak on the east side of Hickory creek; then north down the creek two hundred poles to a large white oak on the east side of said creek; then north forty-five east nine hundred poles to a stake and pointers on the Rock Creek mountain; then south twenty east eleven hundred and ten poles to the beginning, excluding all legal prior claims, leaving 5,000 acres as surveyed.

Surveyed 15th March, 1837, with the appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Joshua English and others and their heirs forever.

In witness whereof James C. Jones, governor of the State of Ten-

nessee, has hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, 28 day of August, in the year of our Lord one thousand eight hundred and forty-five, and of American Independence the seventieth.

7 By the governor: JAMES C. JONES.

JOHN S. YOUNG, *Secretary.*

Joshua English and others have title to the within-described tract of land.

ISAAC LEWIS,
*Reg. E. Tenn.*

Recorded in vol. 26, page 668.

ISAAC LEWIS,
*Reg. E. Tenn.*

Endorsed: No. 25338. Joshua English and others. Campbell county. 5,000 acres.

Plaintiff read deposition of Jane Burgess, in the words and figures following:

(Defendants here admitted that the land described in said grant was the same described in the declaration and involved in this suit, and located in Campbell county, Tennessee, in the northern division of the eastern district of Tenn.)

*Notice.*

UNITED S. OF A.,
*Eastern District of Tennessee.*

Circuit Court.

JANE BURGESS
*vs.*
J. S. LINDSAY *et al.*

Mess. Henderson & Jourolmon, att'ys for def'ts:

On Thursday, the 24th day of April, 1890 (and succeeding days if necessary), at the house of Mrs. Jane Burgess, in Stewartsville, De Kalb Co., Mo., I will take the deposition of Jane Burgess, to be used as evidence in behalf of plaintiff in the above-named cause.

This 17th day of March, 1890.

JANE BURGESS,
By WASHBURN, *Att'y.*

8 Endorsed: Notice. Jane Burgess *vs.* J. S. Lindsay *et al.* I hereby deputize —— —— to execute and return this notice. This — day of ——, 187–. Delivered a true copy of this notice to —— —— on this — day of ——, 187–. Due and legal service acknowledged this 18th day of March, 1890. Leon Jourolmon, att'y for def'ts.

Circuit Court.

UNITED STATES OF AMERICA, }
*E. Dist. of Tennessee.* }

JANE BURGESS }
*vs.* }
J. S. LINDSAY *et al.* }

Deposition of Jane Burgess, witness for the plaintiff in the above-named case, taken on the 24th day of April, 1890, at her residence in Stewartsville, Mo., in the presence of Ben. Johnson and W. A. Henderson.

The said witness, JANE BURGESS, age 81, being duly sworn, deposes and says:

By the PLAINTIFF:

Question 1st. What is your age and residence?

—. My age is 81; my residence, Stewartsville, Mo.

Question 2nd. Who was your father and when did he move from Campbell county, Tennessee, to Missouri?

Answer. Joshua English was my father and he moved from Campbell county, Tennessee, to Ray county, Mo., in 1838.

Question 3rd. Was he the Joshua English that entered the land sued for?

Answer. He was.

Question 4th. Did he obtain a grant from the State of Tennessee for the land sued for?

Answer. He did, so I have been informed, but I have no recollection of having seen it.

9 Question 5. When and where did he die?

Answer. He died in 1850 in Knoxville, Ray Co., Mo.

Question 6. When was your husband or father last in Tennessee and what portion of Tennessee?

Answer. My father never returned to Tennessee. My husband went back to Tennessee in 1841 or 1842 on business for his father.

Question 7. Who were the children of Joshua English and who were his heirs at his death?

Answer. I was the only child and only heir at his death.

Question 8. Did he ever have any child but yourself?

Answer. He did not.

Question 9. Who did you marry and when?

Answer. I married Samuel T. Burgess February 9th, 1826.

Question 10. When did your husband die?

Answer. He died in 1874, July 30th, in Stewartsville, Mo.

Question 11. Have you ever married since his death?

Answer. I have not.

Question 12. Have you the original grant for the land sued for?

Answer. I have not.

Question 13. Have you ever seen it?

10 Answer. I have never seen it that I recollect of.

Question 14. Do you know any other fact material to this case?

Answer. No; I do not.

Question 15. Are you the plaintiff in this case?

Answer. I am.

Question 16. Do you know who was your father's agent in Campbell county, Tennessee, to look after these lands?

Answer. Mr. Joseph Peterson and Alvis Kincaid.

Question 17. Did he or your husband ever, and how often, send money to said agents to pay taxes on said land?

Answer. I don't recollect anything about them sending any money to pay taxes on land.

Question 18. Who were left to take care of the land and pay taxes upon it?

Answer. He left Mr. Peterson and Mr. Kincaid to look after the land and pay the taxes on it.

Cross-examination:

1. How many children have you and Mr. Burgess now living?

Answer. None; they are all dead.

2. How many of them left issue?

Answer. Only one.

3. Do you know what your husband's business was when he returned to Tennessee in '41 or '42?

11 Answer. He went back on his father's business—to collect money for land his father had sold.

4. From whom and when did you first get the information that your father, Joshua English, got a grant from the State for the land sued for?

Answer. From Mr. Ben. Johnson last winter.

5. Did your father or husband ever write any letters to Tennessee about this land or send any money to pay the taxes?

Answer. I don't know that they ever did.

6. Did either of them or did you know it had been sold for taxes?

Answer. Never until Mr. J. Henderson Reid came here in February, 1889. I believe that Mr. Reid also told me that the State had issued a grant to Joshua English for the land sued for.

7. Until that time did you know you had any claim to land there?

Answer. I did. I heard both my husband and my father speak about it.

8. What did they say in their lifetime about the taxes not having been paid?

Answer. I never heard them say anything about it that I remember of.

9. Do you know the difference between an entry and a grant?

Answer. Yes; a grant is issued by the State after a man has made an entry.

10. Did you ever hear your husband or father claim in their lifetimes that they had a grant?

12 Answer. I don't know I ever did.

And further the witness saith not.

JANE BURGESS.

STATE OF MISSOURI, }
*County of De Kalb,* } ss:

The foregoing deposition was taken before me, as stated in the caption, and was reduced to writing by me.

And I certify that I am not interested in the case nor of kin or counsel to either of the parties, and that I sealed it up and put it in the post office at said Stewartsville without being out of my possession or altered after it was taken.

Given under my hand and official seal this the 24th day of April, 1890. My commission expires Sept. 21, 1890.

JOSEPH CHRISMAN,
*Notary Public.*

[SEAL.]

Notary's fees:

| | |
|---|---|
| 800 words, 15 | $1 20 |
| Oath | 05 |
| Certif. & seal | 50 |
| Postage | 05 |
| | $1 80 |

Received payment from plaintiff.

J. CHRISMAN,
*Notary Public.*

Endorsed: Jane Burgess *vs.* Jonathan Lindsay *et al.* Deposition of Jane Burgess. Received sealed up from the post office at Knoxville and filed April 28th, 1890. H. H. Taylor, clerk, by J. T. Carter, D. C.

Plaintiff here closed in chief.

13 Defendant introduced the following witnesses, who testified as follows:

1. JOHN JENNINGS:

I am a surveyor and an attorney-at-law, and am familiar with the land covered by grant read by plaintiff. They lie in Campbell county, Tennessee, and are the same described in the declaration. There is no dispute about the outside boundaries. I have made a map of the lands, which is here exhibited. The portions upon which defendants have had adverse possession show in red upon the map. The locations are accurate, but the sizes are somewhat enlarged; that may be easily seen. Otherwise the map is correct.

(It is agreed by counsel on both sides that the map marked as Exhibit "A" to the bill of exceptions shall constitute part of the record in this cause and be forwarded to the supreme court as such, and it is so ordered by the court.)

JENNINGS continued as follows:

Letter "A" or map is what is known in the neighborhood as the McCormick old field and comprises about 6 acres. It is at present under fence, but not under cultivation. How long defendants have kept up the enclosures continuously, if they ever did, I do not know. The salting places where defendants salt their cattle which they herd or graze on the land are correctly down on the map. The one public road over this tract of land enters it at the McCormick field marked "A," passes northeastward down through the salting places, thence down Rock creek, on the east side, by the possessions marked B & C. and out of the tract with said Rock creek.

The tract known as the P. P. Baird tract, containing 300 acres, and so marked, is held by a title older than plaintiff's, and there is no dispute about it.

Possession "B" is a field containing 6¼ acres. There is no fence dividing it from P. P. Baird tract. I have known this possession between 15 and 20 years. I made a survey over there in
14 1875. There is no dispute about where Baird's line runs, and he claims and cultivates that field below his line as a tenant of Myers & Sharp, two of defendants. It has been cleared and in cultivation for years; don't know how long.

Possession "C" is where Jerry Campbell lives. He has his dwelling-house on it and cultivates it. He claims that he rents it from Myers & Sharp. He is here.

The tract in litigation is known as the English survey. Up to shortly before this suit began I never knew or heard of any one claiming the land except the Myers & Sharp. It has always been known as the Myers & Sharp land since I have lived in the country—about 20 years.

The tract next below the one in litigation is known as the Jehu Branham, 1,400 acres. I have run some of its lines and know the beginning corner. It is a white oak below the mouth of Flat Lick branch, and is shown on the map at "D." From there on to the sour-wood corner, as called for in the Branham grant, the courses and distances correspond, and the lines and corners are marked on the trees as called for in the grant. Part of the other lines of this grant cannot be run conformably to the grant, because, 1st, the line is called to run to the English line, but pursuing the call it will never reach the English line as we now locate and know it; 2, then it is called to run with the English line to the beginning corner, whereas this beginning corner is inside the English grant, as shown on map. Jehu Branham claimed that his closing line run N. 47 deg. E. to his beginning corner, and the portion of the cleared land lying north of a line thus run to the beginning corner does not appear as colored red on the map, but the larger portion of the Jehu Branham cleared land, colored and marked "$C^2$," lies north of such a line, and the land north and south of such line, on the west side of the creek, is and always has been under one fence and cultivated altogether, and there is no such marked line on the ground.
15 The colored part marked C2 shows only the portion of cleared

land lying south of said line. The greater portion of that field lies north of the line.

Cross-examined:

I am one of defendants' counsel; made this map within the last six months, but I have platted that land, I suppose, a dozen times; have done much surveying in that neighborhood; have known the land 15 or 20 years. In the last ten years I first heard the defendants were in possession. At that time one of the Rutherfords lived on the Baird tract, but I do not know which one of the Rutherfords. I knew the land when William Rutherford and also when Abner Rutherford lived on it, but I did not get the information from them. I have understood it from Prior Baird only recently—in last three or four years. When I first saw the old McCormick field there was no fence around it at all. I don't think it has always been fenced up. There has been a fence on it for the last ten years, but it is an old fence that has been abandoned and partly down. No one lives in the old McCormick field. There are no enclosures around the salting places—nothing to prevent other cattle from going there to lick salt.

(Plaintiff read to witness and introduced in evidence a deed as follows:)

I, Jahne Branham, have this day bargained and sold and do hereby transfer and convey to Laban Sharp and his heirs forever, for the consideration of one hundred and fifty dollars to me in hand paid, a tract of land lying in the State of Tennessee, Campbell county, in the eleventh district, containing by estimation two hundred acres, *to* be the same more or less, and bounded as follows: Beginning at a white oak on Rock creek below the Flat Lick in the line of a 5,000-acre survey in the name of Joshua English & others, then north twenty-four west eighty poles to a white oak; then due north thirty-four poles to a sour-wood; then westward with Campbell's line to a pine corner; then due west to Gayler's line; then with Gayler's line southward to a chestnut oak corner; then due west with Gayler's line to the top of the ridge; then southward with the top of the ridge to a large pile of rocks; then westward with the spur of the ridge to a white walnut corner, a beginning of Zachariah Campbell's twenty-acre survey near his house; then with Campbell's line southward to Gayler's line; then with a line called the Linchmore line to a white oak corner; then southward with a line of twenty-acre survey made by Gayler to the big survey line; then with said line to the beginning.

I do covenant with said Laban Sharp, his heirs and assigns forever, that I am lawfully seized of the said land and have a good right to convey it, and that the same is unincumbered; and I do further covenant and bind myself, my heirs and representatives, to warrant and forever defend the title of the said land against the lawful claims of all others forever.

This 5th day of December, 1854.

his
JAHNE x BRANHAM. [SEAL.]
mark.

Attest:

LEROY BROWN.

Jurat, 2nd July, '55.

ISAAC SHARP.

Jurat, 28th June, '55.

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, William Cary, clerk of Campbell county, Leroy Brown and Isaac Sharp, subscribing witnesses to the foregoing deed, the said Isaac Sharp on the 28th day of June, 1855, and the said Leroy on the second day of July, 1855, who, being first sworn, depose and say that they are acquainted with Jahne Branham, the foregoing-named bargainer, and that he acknowledged the same in their presence to be his act and deed upon the day it bears date.

Witness my hand at office second day of July, 1855.

WM. CARY, *Clerk.*

17 STATE OF TENNESSEE, }
*Campbell County.* }

REGISTER'S OFFICE, *this the 10th Day of July*, 1855.

Then were the within deed and certificate thereto annexed registered in my office, in Jacksborough, in Book M, on pages 502, 503, & 504, at eight o'clock in the forenoon.

GEORGE W. SMITH,
*Register for Campbell County, Tennessee.*

| | |
|---|---|
| Clerk's fees | $0 37½ |
| State tax | 30 |
| Register's fee | 1 00 |
| | $1 67½ |

Endorsed: Jahne Branham to Laban Sharp. Deed, 200 acres. Ex. A to answer of Silas Sharp *et al.* Filed March 30th, 1889. J. H. Agee, C. & M., by J. W. Agee, D. C. & M. Ex. B to bill of ex.

JENNINGS continued:

There is no dispute among correct surveyors as to the beginning corner and the lines and corners up to and including the sour-wood corner. Mr. Douglas and Chas. Waring, surveyors, agree with my running. The majority of men agreed that I ran the correct——

Re-examination:

Defendants introduced in evidence and read to witness the following deed:

Whereas a judgment was given in favor of the State of Tennessee by the circuit court of Campbell county on the 5th day of January,

1845, for four dollars and 30 cents for taxes, costs, and charges due and unpaid for the year 1844 against a tract of land of which Joshua English, Samuel T. Burgess, and Joseph Peterson are the reputed owners, containing by estimation five thousand acres, lying in the county of Campbell and State of Tennessee, in district No. 5th, and bounded as follows, to wit:

18 Beginning at a white oak on the north side of Cumberland mountain near said English's corner of a one-hundred-acre survey, running thence south forty-five west three hundred and eighty-five poles to a white oak by the side of a path below Morgan's old mill; then the same course continued five hundred and eighty poles to a stake and pointers on the north side of said Cumberlan- mountain; then north twenty degrees west nine hundred and sixty poles to a black oak on the east side of Hickory creek; then north down the creek two hundred poles to a large white oak on the east side of said creek; then north forty-five east nine hundred poles to a stake and pointers on the Rock Creek mountain; then south twenty east eleven hundred and ten poles to the beginning; on which judgment and order of sale issued and came to my hand as sheriff and collector of the county of Campbell on the 23rd day of March, 1844, by virtue of which, after advertising and giving notice agreeably to the law, I sold the said land at the court-house door of said county on the first Monday of July, 1844, at public sale to John Myers, Alvis Kincaid, and Thomas Douglas for the sum of four dollars and thirty cents to me in hand paid, that being the highest and best bid for the same: Therefore I, Russel Miller, as sheriff and collector of said county, in consequences of the premises and in consideration of the said sum of four dollars and thirty cents, do hereby transfer and convey the said tract of land above described to the said John Moyers, Alvis Kincaid, and Thomas Douglas and their heirs and assigns forever in as full and ample a manner as I am as sheriff and collector as aforesaid authorized and required to do by law, but no further or otherwise, this 8th day of Dec., 1845.

RUSSEL MILLER, [SEAL.]
*Sheriff and Collector of Campbell County, Tennessee.*

Executed and delivered in our presence.
CALVIN DOSSETT.
JOHN KINCAID.

19 STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, William Carey, clerk of Campbell county court, Russell Miller, sheriff and collector of said county, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within deed for the purposes therein contained.

Witness my hand, at office, this 5th day of May, A. D. 1846.

WILLIAM CAREY, *Clerk.*

STATE OF TENNESSEE, }
*Campbell County.* }

REGISTER'S OFFICE, *May the 13th*, 1846.

Then and there *was* the within deed and certificate thereto annexed registered in my office, in Book K, page fortieth, at five o'clock in the afternoon.

JOHN GRIMES,
*Register of Campbell County.*

| | |
|---|---|
| State tax | $7 50 |
| Cl'k's fee | 25 |
| Register's fee | 1 25 |
| | $9 00 |

Received payment,

JOHN GRIMES, *R. C. C'ty.*

Endorsed: Sheriff's deed to John Moyers, Alvis Kincaid, and T. Douglas, 5,000 acres. Ex. D to bill of ex.

JENNINGS continued:

This deed covers the land in dispute. I stated there was nothing to prevent other cattle from going to these salting places, but Sharp and Myers are the only ones who range their cattle there.

20 JONATHAN L. LINDSAY:

I am one of the defendants; 68 years of age; have had some knowledge of this land ever since I was a boy. I live there in vicinity. I knew Col. Jos. Peterson, one of the owners of the land, intimately. For a great many years, say since the war, Laban Sharp, his son Henry, and Isaac Myers have been claiming this land. They were large cattle dealers. They are all dead now. I have been upon the lands. It was not at that time good for farming purposes. There were only a few men who had settled upon the mountains, and their principal possessions were of cattle. The large farmers who lived in the valley followed stock-raising as their principal avocation and ranged their cattle on the mountains, but the mountain men objected to their ranging cattle there unless they owned the land. I don't think they were particular to keep their cattle on their own land, as all that was necessary was that they should own land on the mountain. I have lived in vicinity of Jacksboro' all my life; done a good deal of business there; was clerk of chancery court for 12 years. This was a well-known tract and frequently spoken of. I never knew of any such claim of plaintiff until this suit was brought. Col. Joe Peterson, one of the 3 enterers of this land, died in 1844 or 1845. His son, John Peterson, was clerk of the county court 10 or 12 years. During this time def'ts were using this land as a cattle range. In grazing cattle, usually where a man has a considerable herd, say 50 or 100, he rents houses and some one to look after them and salt them about once a week. The defendants' ownership of the land was notorious in the county

while Jno. Peterson was county court clerk. At that time such land was regarded as of very little value—not more than 4 or 5 cents per acre.

(Defendants introduced and read the following papers, and it was admitted that they each cover the part of the English grant marked H. P. Johnson on map, Ex. A to bill of exceptions:)

21 We, Joseph Peterson, for himself and Joshua English, and Alvis Kincaid, att'y for Samuel T. Burgess, bind ourselves to pay Thomas Douglas the sum of fifty dollars.

The condition of this obligation is such that whereas the said Joseph Peterson has sold a certain piece of land to the said Thomas Douglas this day for twenty-seven and one-half dollars, secured by note three years after date, three hundred and fifty acres of land, lying in said county of Campbell, on the east fork of Big creek, adjoining, between, and along the lands of said Douglas and said creek so as to include the long bottom on the creek below Douglas' farm and to embrace the Wolf Pen branch—said tract is a part of a five-thousand-acre survey made by said Peterson, English, and Burgess: Now, if the said Peterson and Kincaid shall make the said Douglas a good deed in fee simple to said three hundred and fifty acres of land on or before the 10th of March, 1884, then this obligation to be void.

Given under our hands and seals this 10th day of March, 1842.

JOS. PETERSON. [SEAL.]
JOSHUA ENGLISH,
By JOS. PETERSON. [SEAL.]
SAMUEL T. BURGESS,
By ALVIS KINCAID,
*Att'y-in-Fact.* [SEAL.]

Attest:
JOHN KINCAID.
JOHN QUEENER.

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, John Peterson, clerk of the Campbell county court, John Kincaid, one of the subscribing witnesses to the within title bond, who, being first sworn, depos- and said he is acquainted with Joseph Peterson and Alvis Kincaid, the within named bargainors, and that they acknowledged the same in his presence to be their acts and deeds for the purposes therein
22 contained and upon the day it bears date; and Thomas Weir, having also personally appeared before me, John Peterson, clerk of Campbell county court, said Weir being first sworn, depose- and said he is acquainted with the handwriting of John Queener, a subscribing witness to the within instrument, and that said Queener's name is in his own proper handwriting.

Witness my hand, at office, this 1st day of May, 1861.

JOHN PETERSON, *Clerk.*

STATE OF TENNESSEE, }
*Campbell County.* }

REGISTER'S OFFICE, *this 2nd Day of January*, 1862.

Then were the within deed and certificate thereto annexed registered in my office, in Jacksboro', in Book "O," on page- 334 and 335, and at half past ten o'clock in the forenoon.

JOHN RYAN,
*Register for Campbell County, Tennessee.*

Endorsed: Peterson, English, & Burgess bond for title to 350 acres land. Ex. E to bill of ex. Reg. fee, $1.00. Cl'k fee, $0.25; State tax, $0.52½—$0.77½. Come to hand 2nd of *Jnau*ary, 1862, at half past ten o'clock in the forenoon.

*Deed from Thomas Douglas to H. P. Johnson.*

This indenture, made the 13th day of March, in the year one thousand eight hundred and sixty, between Thomas Douglas, Sr., of the one part, and Hiram P. Johnson, of the other part, both of the county of Campbell and State of Tennessee, witnesseth:

That the said Thomas Douglas, Sr., for and in consideration of the sum of six hundred dollars to him in hand paid or secured to be paid by notes of hand, under seal, bear*s* date of this obligation, the said Douglas retain*s* a lien upon the land until
23 purchase-money is paid, the receipt whereof is hereby acknowledged, hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, and sell, alien-, release, convey, and confirm, unto the said Hira*n* P. Johnson, his heirs and assigns, a certain tract, piece, or parcel of land situate, lying, and being in the county aforesaid, on the waters of Big creek and in civil district No. 5, and which is lotted and located as follows, to wit: Beginning at a chestnut and beech standing on the north side of the Cumberland mountain in or near a line of George Johnson's, then running south 45 west, crossing the creek at 48 poles, in all 60 poles, to a large spruce pine on the north bank of the creek at a ford; then south 45 east, crossing the creek 8 poles, to a white oak; then south 18 west 52 poles to a small red oak opposite to an old mill-seat; then south 67 west 74 poles to a white oak; then south 30 west 40 poles to a black gum; then south 45 west 25 poles to a maple; then south 60 west 120 poles to a large white oak; then due south 10 poles to a poplar; then south 45 west 60 poles to a chestnut oak; then north 30 west, crossing the wagon road at 21 poles, crossing the creek at 36 poles, in all 60 poles, to a stake on a steep hillside; then north 45 east 60 poles to a stake; then due north 10 poles to a stake; then north 45 east 60 poles to a stake; then due north 125 poles to a stake in the head of the left-hand fork of the Coal Bank branch; then north 64 east 220 poles to a stake in George Johnson's line, and with it south 45 east 100 poles to the beginning, containing by estimation three hundred and seventy-five acres, including an old 25-acre survey, for which the said Douglas holds a deed *for:*

To have and to hold the said tract, piece, or parcel of land, with all and singular the improvements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, to him, the said Hiram P. Johnson, his heirs and assigns forever; and
24 the said Thomas Douglas, Sr., for himself, his heirs, executors, and administrators, doth further covenant, promise, and agree to and with the said Hiram P. Johnson, his heirs and assigns forever, — have, hold, and enjoy the peaceable, quiet, and uninterrupted possession of the lands and tenements hereinbefore described and conveyed or intended to be conveyed. The said Thomas Douglas further agrees to defend all claims set up by or through him by any person or persons claiming under or through him, either in law or equity, and no further.

In witness whereof the said Thomas Douglas has set his hand and seal the day and year first above written.

THOMAS DOUGLAS. [SEAL.]

Witness:
GEO. W. SMITH.
WM. TAYLOR.

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, John Peterson, clerk of Campbell county court, George W. Smith and William Taylor, subscribing witnesses to the within deed, who, being first sworn, depose and said they are acquainted with Thomas Douglas, the within-named bargainor, and that he acknowledged the same in their presence to be his act and deed for the purposes therein contained and upon the day it bears date.

Witness my hand, at office, this 7th day of Nov., 1860.

JOHN PETERSON, *Cl'k.*

STATE OF TENNESSEE, }
*Campbell County,* }

REGISTER'S OFFICE, *this 2nd day of January,* 1862.

Then were the within deed and certificate thereto annexed registered in my office, in Jacksboro', in Book O, pages 337 & 338, and at half past ten o'clock in the forenoon.

JOHN RYAN,
*Register for Campbell County, Tennessee.*

25 Reg. fee, $1.00. Cl'k fee, 25c.; State tax, 56½c.—81½c. Come to hand this 2nd day of January, 1862, at half past ten o'clock in the forenoon. Jurat, 7th Nov., 1860.

Endorsed: T. Douglas. Deed to land, 375 acres. Ex. F to bill of ex.

JOHN MYERS testified:

One of def'ts; am 61 years old; born and raised in Campbell county, near Big Creek Gap, about two miles from the

land; I farmed and raised stock. My brother and — generally have from 300 to 500 head of cattle. We could not range them on our valley farm. I have known the land in dispute ever since I was a boy; never heard of any claim of plaintiff to it until shortly before this suit began. My father, Isaac Myers, claimed to be one of the owners of the land. We lived at Big Creek, 1½ miles from the gap, which is about two miles from the land. My grandfather, John Myers, was one of the original buyers of the land at the sheriff's sale. He and my father are both dead. John Myers died intestate about 1852, leaving three children his heirs-at-law, viz., my father, Isaac Myers; Anna Sharp, wife of Laban Sharp, and Eliza Sharp, wife of David Sharp. They are now all dead. Laban Sharp's heirs were Henry Sharp and the def'ts. Silas Sharp, Emily Mullins, Mary Longmire, Elizabeth Richardson, Louisa Condray, and Henry Sharp *us* now dead, and the defendants Caspar Sharp and Anna Wheeler are his children and heirs. The defendants W. H. Sharp and Anna Miller are two of the heirs of Eliza and David Sharp, deceased. My father, Isaac Myers, sold his interest in the land to his four sons by the following deed:

This indenture made and entered into this September 27th, 1881, between Isaac Myers of the first part and John Myers, Wm. H. Myers, Archable Myers and D. F. Myers of the second part, all of the county of Campbell and State of Tennessee, witnesseth:

That the said Isaac Myers for and in consideration of one hundred dollars to him in hand paid, the receipt whereof is
26 hereby acknowledged hath bargained and sold and by these presents doth bargain and sell unto the said John Myers, Wm. H. Myers, Archable Myers and D. F. Myers, their heirs and assigns forever, my undivided interest in the following-described tracts or parcels of land, to wit: My (4/9) four-ninths interest in what is known as the English survey lying and being in the county of Campbell on the north side of Cumberland mountain on the waters of Big creek and Hickory creek which was granted by the State of Tennessee to Joshua English and others under an entry bearing date August the 2nd, 1836, and bounded as follows, to wit: Beginning at a white oak on the north side of Cumberland mountain, near said English'- corner of a hundred acre survey; running thence south forty-five degrees west along the north side of the mountain three hundred and eighty-five poles to a white oak by the side of a path below Morgan's old mill, the same course continued five hundred and eighty poles to a stake on the north side of the mountain, thence north twenty west nine hundred and sixty poles to black oak on the east side of Hickory creek then due north two hundred poles to a large white oak on the east side of the creek; then north forty-five east nine hundred poles to a stake on the Rock Creek mountain; then south twenty east eleven hundred and ten poles to the beginning, containing five thousand acres, excluding all older claims, be the same more or less. Also my one-third interest in a tract of land granted by the State of Tennessee to John Myers bearing date September the 16th, 1841, containing (300) three hundred

acres lying in Campbell county, Tenn., on the west fork of Big creek. Beginning on a white oak on the north side of said creek on the side of the path above Elizabeth Brockus' line; then south twenty-eight east for six poles crossing the creek to a white oak; then south forty-seven west one hundred and ninety poles to a white oak; then north twenty-eight west two hundred and seventy-three poles to a white oak on the north side of a branch; then north forty-seven east eighty poles to a poplar; then north seventy-
27 five east one hundred and fourteen poles to a white oak on the middle fork of Big creek; then south forty east one hundred poles to a stake on the long spur; then a direct line to the beginning. To have and to hold the same with all its appurtenances to the said Myers, their heirs and assigns forever, warranting and defending the title to said interests against the lawful claims of all persons whomsoever day and date above written.

ISAAC MYERS. [SEAL.]

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, S. C. Baird, clerk of the county court of said county, Isaac Myers, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand, at office, this May 17, 1882.

S. C. BAIRD, *Clerk.*

Endorsed: Warrantee deed. Isaac Myers to John Myers *et al.* Register's office, State of Tennessee, Campbell county. Received for record May 17, 1882, at about 5 o'clock p. m. Registered May 18, 1882, at 11 o'clock a. m., in Book "V," page 157. G. W. Brown, reg.; S. C. Baird, dep't. Ex. G to bill of ex.

JOHN MYERS' evidence continued:

As far back as I know my grandfather, father, brothers, and myself have used this land as a range for our stock and the Sharps used it the same way under the same claim. In our business of raising stock it was necessary for us to have such a place. It was not suitable for anything except a range for cattle. We kept some parties on the mountain to look after the cattle and salt them. These people that we had in the mountains would also see that the stock were not run out of the range and also look after the
28 timber—that it was not destroyed. We had these people purposely for doing these things. We had John and William Jordon on the land to do this service for us. John lives near the possession marked "C" on the map; he is at home sick. While their mother was alive they all lived together on the possession marked "C," as our tenants on the English survey. Amos and John Jordon built the house there where Jerry Campbell now lives, marked "C." Our tenants have held it ever since. Jehu Branham lived just beyond this possession, and my uncle, Laban Sharp, bought his possession from him—about 200 acres of land—for him-

self individually. He was also interested in the English survey. These tenants of ours at possession "C" were to clear the land, build a house, look after our stock, and take care of the timber. They all did that service. I cannot tell how long they lived there; the house was built just after the war. Jerry Campbell now lives on it and has the land in cultivation, with a fence around it, which has been kept up from the time the house was built. I think the house has been occupied from that day to this. These people lived there as our tenants. Our title was never disputed before this suit was brought. Jehu Branham never claimed the possession at "C." I knew him well. I heard he made a little entry there, but he made no claim to it provided it was English survey. I would go over there every week or two. I knew the beginning corner of the P. P. Baird tract. It is a beech. Below the beginning corner we had 6 or 7 acres in possession—cleared and under fence. We put William Rutherford there. It is indicated on the map as "B." He was to stay there and look after the cattle and the timber. There was a necessity for a man to look after and salt the cattle and keep them from going down the valley, and if they ranged over the boundary to drive them back and protect the timber, which has been growing in value ever since the war. William Rutherford did that service for us. Prior Baird is now in possession of the same land
29 under the same arrangement. There is no house upon it now, but formerly there was one built by William Rutherford. He sold his land to his brother, Abner Rutherford, and he said he thought I ought to pay him something for building the house on our land, and I paid him ten dollars for building it. I don't think William or Abner Rutherford ever claimed to own the land. They never claimed to hold it for anybody except us. Mr. Baird is now cultivating it as our tenant. After I paid William Rutherford for the house I let William Baird move it on his own land. My impression is that William Rutherford was there at the breaking up of the war.

(Def't next put in evidence and read to witness the deed from Alvis Kincaid to Isaac Myers for interest in this land as follows:)

This indenture, made and entered into this 22nd day of May, 1849, between Alvis Kincaid, of the county of Campbell and State of Tennessee, of the one part, and Isaac Myers, of the same place, of the other part, witnesseth:

That the said Alvis Kincaid, for and in consideration of the sum of fifty dollars in hand paid, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell, unto the said Isaac Myers, his heirs and assigns forever, my undivided one-third of the following-described tract or parcel of land situate, lying, and being in the aforesaid county of Campbell, on the north side of Cumberland mountain and on the waters of Big creek and Hickory creek, which was granted by the State of Tennessee to Joshua English and others under an entry bearing date the 26th day of August, 1836, and bounded as follows, to wit: Beginning at a white oak on the north side of Cumberland mountain,

near said Englishe's corner of a one-hundred-acre survey, running thence south 45° west along the north side of the mountain three hundred and eighty-five poles to a white oak by the side of a path below Morgan's old mill; the same course continued five hundred and eighty poles to a stake on the north side of Cumberland mountain; thence north twenty degrees west nine hundred and sixty poles to a black oak on the east side of Hickory creek; thence due north two hundred poles to a large white oak on the east side of said creek; thence north forty-five east nine hundred poles to a stake on the Rock Creek mountain; thence south twenty degrees east eleven hundred and ten poles to the beginning, containing five thousand acre- (excluding all older claims), be the same more or less, together with all and singular the profits, commodities, hereditaments, and appurtenances thereunto belonging, and all the estate, title, interest, claim, and demand that the said Alvis Kincaid has of and into the aforesaid described tract of land, free from the lawful claims and demands of myself, my heirs and assigns forever, unto the said Isaac Myers, his heirs and assigns forever; and I, the said Alvis Kincaid, do bind myself to warrant and forever defend the title to the said one-third of the above-described tract or parcel of — unto the said Isaac Myers, his heirs and assigns forever, either in law or equity.

In witness whereof I have hereto set my hand and seal the date above written.

ALVIS KINCAID. [SEAL.]

Signed, sealed, and delivered in presence of—
Attest: LABAN SHARP.
his
JOHN x MYERS.
mark.

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, William Carey, clerk of Campbell county court, Alvis Kincaid, the above-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the foregoing deed for the purposes therein contained.

Witness my hand at office this 23rd day of May, 1849.

WILLIAM CARY, *Clerk.*

31 STATE OF TENNESSEE, }
*Campbell County.* }

REGISTER'S OFFICE, *June the* 10*th*, 1849.

Then and there were the within deed and foregoing certificate registered in my office in Book "K," on page three hundred and forty-seven, at ten o'clock in the forenoon.

JOHN GRIMES,
*Register for Campbell Count-.*

| | |
|---|---|
| State tax | $2 49 |
| Clerk's fee | 25 |
| | $2 64 |

Received payment.

WM. CARY, *Clk.*

Register's fee, $1.00.

Endorsed: A. Kincaid, deed, to Isaac Myers, 1,500 acres. Ex. G to bill of ex.

JOHN MYERS continued: This is my father's deed.

Cross-examined:

Have known this land a great while and have herded a great many cattle on it. The valley people generally herded their cattle over there close to Big Creek Gap. It was so important that we kept men over there to look after the land and tend to it.

I know where the Branham grant lies. John Jordan was the first man that built the house over there. They lived there a year or so under Laban Sharp. I don't know whether they built that house under Laban Sharp or not. I don't know when Welburn lived there. I never had anything to do with him. I don't think I was there when Gaylor lived there. Jerry Campbell has lived there 6 or 7 years. He didn't go there under me. Don't know whether he went there under Henry Sharp, nor how he came to go there. The Baird tract is known as the Richardson entry. The first man I know of claiming that line from the beech tree was Oscar Russell, and then Labar Sharp. William Rutherford built the house on our possession at "B," and was to look after the cattle and salt them and look after the timber. He sold out to his brother Abner. I had no agreement with Abner. He staid there just
32 like William did. That possession has been kept fenced up.

It is not true that Rutherford was offering to sell that land to a half dozen people and finally offered to sell it to me and I bought it. I did not buy the land of him. I did not take any conveyance on it, as I remember now. If I did I left it at home. He built the house, and then I paid him $10.00 for the house, and then I gave the house to Prior Baird. This occurred several years ago. I suppose the land at that time was worth $1.00 an acre. I knew Alvis Kincaid, one of the parties to the tax deed. He also executes the English deed to Douglas as agent. Neither William nor Abner Rutherford ever paid me any rent; don't know how many years William stayed here. While Abner was there I said nothing to him about the land. Laban Sharp bought 200 acres of Jehu Branham at the south portion of the tract, including the old house and enclosure where Jehu Branham formerly lived. Sharp never lived there, but rented the place out.

Re-examined:

Neither I nor any of my folks have any interest in the Jehu

Branham land. It was owned by Laban Sharp, who also, with his wife, owned a $\frac{1}{9}$ interest with us in the English survey.

While Jerry Campbell and these people were living at possession "C" I heard them say they were claiming under my father and Laban Sharp. This had no connection whatever with the Jehu Branham tract. This claim has never been disputed that I have ever heard of. Laban Sharp never claimed to own that land by himself that I know of. The ones that lived there said they got it from my father, and Laban Sharp was interested with my father in it.

33 AMOS JORDAN testified:

I live on the Jehu Branham entry, just below the English survey. When my brother-in-law, William Rutherford, moved off the Jehu Branham place mother and I took a lease for it from Laban Sharp. He said there was a line run through there between loom-house and the main house to his beginning white oak corner and warned us not to cut the timber nor fence the land over on the English side. This was about the breaking up of the war. I then went over into the valley and leased the English survey from Isaac Myers and Henry Sharp. We did not see Laban when I went over, who was over in the Big valley, and I sent word by his son Henry and he got his father to agree to come over to lease the English land to us. The line was so close to the house that we wanted to clear up a portion, and we cleared up a little patch there which is indicated on the map at "C" (map exhibited). I never saw the Jehu Branham line run, but he showed it to me, and his beginning corner was the white oak below the Flat Lick branch. I don't know of any dispute about that being the beginning corner of the Branham 1,400-acre entry. I have been with Mr. Jennings at the tree. After I leased from Sharp and those people I cleared a piece of land over on the English side of from 5 to 7 acres. The house in which we lived on the Jehu Branham entry was an old one. We staid in it awhile and then we built (I and my brother John) a new house over on this English survey. We moved into the new house and used the old one on the Branham place as a stable. The new house is on the English survey, and is the same in which Jerry Campbell now lives. As well as I can remember we built this new house 23 years ago, and from that day to this that possession has been kept up. I kept it in possession myself fourteen years, and then my mother and family lived on it. She was a widow. In the arrangement which I made with Mr. Sharp and Mr. Myers I agreed to fence the land, and took a lease of it for six years for what improve-
34 ments I made on it—to clear it and fence it and trim out an orchard and put some fruit trees on it. They kept cattle over there, and I was to look after them an- salt them and to keep people from running them off and to keep people from cutting the timber. Sometimes they kept 500 or 600 head of cattle there.

Jehu Branham never claimed that this improvement was covered by his 1,400-acre survey. He made another little entry over there and had some knife-marks on the trees and kept harping and growl-

ing about me and my brother-in-law, Johnson, cutting timber around the new house. Branham wanted to sell it to me, but he would not make out a deed to it. He said that if the English survey did not take it it would be his. I do not know that he ever got a grant. He told me that he could get one, and that he had marked around it with his knife.

We built the new house in the woods and cleared some six or seven acres around it.

I know the Richardson entry, now the P. P. Baird 300-acre tract; know where they always call the beginning corner. There was never any dispute about its location, but when Rutherford came there Dan. Sharp came there and they got in a fuss about it. Sharp had it fenced up. They told me this when I first moved to Rock creek. Wm. Rutherford told me that they all told him that Laban Sharp had sold him a part of this field, and that the line begins where it struck the fence at a couple of double poplars and runs thence to the beech, the beginning corner of the tract. I guess, to the best of my recollection, there is about ten acres under fence, and that was claimed as part of the English survey. There was a house built on it, but it was gone when I went there. The old chimney was there. Then Cain Ayres built a house there and lived awhile on it, and then the Rutherford-, and then Prior Baird took the house and tore it down. The first one that occupied that
35 house after the war was Wm Rutherford. He said he got it of Laban Sharp and Isaac Myers, and they told him to fence it. He was to salt the cattle and keep them there. The next man was his brother, Abner Rutherford. He said he was holding it the same way. He only made one crop there. The next man there was Prior Baird. I heard him say the same as the balance.

Cross-examined:

I was 47 years old last January. My brother John is two years and seven months older than me. He was summoned, but is sick at home, unable to come; that is what I heard. He was here last court. I first went to Rock creek under a contract with Laban Sharp, who had bought 200 acres from Jehu Branham. Branham had formerly lived on the land and had cleared some ten acres around the house. I know the boundaries of the 1,400-acre entry; it is a white oak, standing a little N. E. of the house in or near the line of the English 5,000-acre survey. The tract begins at this white oak, and I was with them when they ran it on to Hickory creek, where night overtook us. It was being run by the Branham boys, who had gotten into a dispute. The lines we ran included the old Jehu Branham house, but there was no marked line there except the beginning white-oak corner. The line from the beginning corner to the sour-wood is distinctly marked on the ground. Labar Sharp pointed out to me the lines on the front side of the English survey when I bought my place. The lease we made of Laban Sharp and Isaac Myers was verbal. My brother-in-law, Johnson, and I made the contract. It will be 24 years the 15th day of next March since we made it. I went there before I was mar-

ried. My brother John was then living in Powell's valley, but after the first three or four years he lived with us off and on. He helped me build the new house that I spoke of. I do not know who first cleared that part of the English survey designated on the map as possession "B." The first I knew of it William Rutherford lived there. The fence had gone during the war and William Rutherford fenced it.

36 Re-examination:

Wm. Rutherford said that the land below his beginning corner at the beech belonged to the English survey. He claimed to hold it, and said he had leave to clear it. He ran the fence outside and added more to it. At that time there was about 15 acres of land cleared.

The Jehu Branham 1,400-acre tract does not include the new house we built.

(Def'ts next introduced in evidence the grant from Tennessee to John Branham for the 1,400 acres as follows:)

No. 26353.

STATE OF TENNESSEE:

To all whom these presents shall come, Greeting:

Know ye that in consideration of an entry made in the entry-taker's office of Campbell county, *of* No. 1114, dated the 24th day of June, 1844, by Jehu Branham, there is granted by the State of Tennessee unto the said Jehu Branham and his heirs a certain tract of land containing fourteen hundred acres, lying in the county aforesaid, on Rock creek, beginning at a white oak on Rock creek below the Flat Lick, in or near the line of a 5,000-acre survey in the name of Joshua English & others, then north twenty-four west eighty poles to a white oak; then due north thirty-four poles to a sour-wood; then north thirty-seven east seventy poles to a white oak among some large rocks, the same course continued six hundred poles to a stake on the Rock Creek mountain; then north fifty-three west three hundred poles to a stake; then south thirty-seven west eight hundred poles to a stake in English's line; then with said line to the beginning.

Surveyed the 14th March, 1845, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Jehu Branham and his heirs and assigns forever.

In witness whereof N. S. Brown, gove-nor of said State of Tennessee, has hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, on the 26th day of October, in the year of our Lord one thousand eight hundred and forty-eight, and of American Independence the 73rd.

N. S. BROWN.

By the governor:

WM. B. A. RAMSEY, *Secretary.*

[Seal of the State of Tennessee.]

STATE OF TENNESSEE:

I, W. T. Jones, register for the land office of East Tennessee, do hereby certify that the within is a true and correct copy of grant No. 26353 from the State of Tennessee to Jehu Branham, as the same appears of record in my office in vol. 27, at page 681, Records Land Office for East Tennessee, at Knoxville.

W. T. JONES,
*Register Land Office for East Tennessee.*

Endorsed: No. 26353. Grant from the State of Tennessee to Jehu Branham.

37 JOHN BOWMAN testified:

I am county court clerk of Campbell county, Tennessee. I do not know nor have I ever heard of plaintiffs paying any taxes on this land. I know of no taxes against them in my county. I only know from the records who has paid the taxes on this tract. Have been county court clerk two months. Have examined the records in my office as far back as 1849. There are no records from 1844 to 1849. Do not know what became of them unless they were destroyed by fire.

WILLIAM H. SHARP testified:

I am a defendant and claim an interest in the land. David Sharp was my father. He died, leaving three children—myself and Anna Miller and Jas. Sharp. James is now dead, leaving heirs. I was born and raised in Campbell county, on Big creek, and have known the land in dispute 40 years. My father and I herded stock on there before the war; after that I moved below Jacksboro'. I haven't kept acquainted with it as if I hadn't moved. I only know the possessions on the land by the man telling me that made them. Jerry Campbell is living there now; I think he is living there as our tenant; think he made his arrangements with Henry Sharp and was to take possession of the Jehu Branham place and the English surveys and he was to have what he made on it.

I know the Prior Baird place and the beginning corner. I never heard any dispute about the beginning corner. We have possession of some six or seven acres below the beginning corner. Prior Baird, then holding it, claimed to hold for the parties it belongs to under the English survey.

The people living there claiming under the English survey were to watch the timber and take care of the stock. I think the possession has been kept up all the time. Possessions are on the public road running through the land. The English survey is notorious.

38 Jerry Campbell was the first man that I knew living on the land at C. I talked with him not long since, but before the bringing of this suit. He then lived in the same house where he now lives. My understanding was he was to take notice of both surveys—the Branham and the English—and take care of the tim-

ber on both surveys. The land was enclosed when he went there. I would suppose there are six acres inclosed on the English tract. Jerry Campbell is here in attendance as a witness for def'ts.

WILLIAM ALLEN testified:

I am the circuit court clerk of Campbell county and have been from 1868 up to this time. The records of that office for the years 1843, '4, '5, and '6 are not in the office; I do not know what became of them; I suppose they were lost either during the war or when the court-house was burned. The court-house of Campbell county was burned in 1883.

Cross-examination:

I did not search for those records before the fire and don't know whether they were burned or were lost during the war; don't know whether or any such ever existed.

ISAAC FORD testified:

I was born in 1828; lived in Campbell county, near Big Creek Gap, near where they say the English survey is; know where the Jehu Branham 1,400-acre tract is. I know where the beginning corner is said to be. Jehu Branham showed it to me. There was never any dispute so far as I know about the beginning corner. It is a white oak on the east side of Rock creek. I saw it last not long since. It was marked as a corner. I saw it during the war and then I never saw it again until last summer. Myself and others looked for it last summer. I rode on until I came to where it was and just looked out and saw it; had no difficulty in
39 finding it.

I know the English survey. I cannot tell who was living on it when I first knew the English survey, but Myers and Sharp claimed it—David Sharp, Laban Sharp, and Isaac Myers. It was forty-odd years old when I first knew it. No one was holding it. They were herding stock on it. I knew the house where Jerry Campbell now lives, just below John Jordon; that white oak standing beside the road close to Jerry Campbell's house setting near 300 yeards down the creek from the Campbell house. The clearing around Campbell's house is small, and the white oak beginning corner is near 270 yards below the fence.

Cross-examination:

Jehu Branham showed me that corner before the war. He then lived on the 1,400 A. tract; his house was on it. He showed me about where the line was. I never followed it nor saw any marked trees on it. He had six or seven acres cleared around his house, which stood on the west side of Rock creek. He said his beginning corner was on the line of the English survey. His house was just outside the line. The English survey line was just south of his house. I saw no marked trees on the line that Branham claimed ran south of his house; don't know how long that house stood nor who took it down.

I remember when Amos Jordon's mother-in-law lived there. I lived 6 or 7 miles from there. While Amos Jordon lived there I heard him say how he came to be there, and since, too. He and his mother were living together. What is called the Flat Lick is right there, close to Jerry Campbell's house, near Rock creek. It is in the fork of the creek and the branch. The Jerry Campbell house stands about 50 yards from where the branch from the Flat Lick runs into the creek. The Flat Lick is about 200 yards up the branch from Rock creek.

I don't know anything of any marked line just south of
40 the Jerry Campbell house running east and west, only when I was there last summer and Jerry pointed across to a tree and said there was another marked line. We were standing in the road, close to Jerry's house. He pointed towards the creek and said there was another marked line, and I told him I did not know anything about that line. It was a little past 1850 when Jehu Branham first showed me the line—before Labar Sharp ever bought the place—and he showed it to me frequently afterwards. I boarded with him. The line is the one leading north from the white-oak beginning corner, and also the closing line running to his white-oak corner.

Re-examination:

Jehu Branham and I had many talks about the beginning corner, which was just across, in sight of his house there. We talked about the English survey. He never claimed any part of it.

WM. RUTHERFORD testified:

Am 63 years old; have lived in Campbell county ever since October, 1861; lived on the English survey a little while, right below Prior Baird's farm, at the place marked with red and "B" on map (Ex. "A"). I went on the place in 1864. I know beginning corner—a beech—of the Prior Baird tract. It stands right across the creek, on east side of Rock creek, 40 or 50 yards from the road. The line runs from that across the creek to a black gum, a marked corner. There was no dispute as to that line—where it was. I bought the Prior Baird tract from Laban Sharp. When I bought it I named to Henry Sharp, son of Laban, about that piece below the line.

There was no dispute about where my line was. There was a small field below my line. I claimed the field. When I sold
41 my place to my brother, Abner Rutherford, I was to let him move into one of the houses on the place until I got a chance to move away, and after the trade was finally closed he wanted me to move out, and I had no other place to move to only that house below my place, and after I moved to that house he rented it to one of my brother's sons and wanted me to give possession. I told him I would not do it; that I had not sold it to him. I did not claim to own any land except what I had bought from Laban Sharp. I first claimed the possession that I had got from Henry Sharp. At the time I named to Henry about fencing

up the land where the fence had been burned below the line he said, Fence it up and cultivate it. I was to do nothing for him except to see after the land and tend to the stock and not let them go down the creek, and if they went down to herd them back up the creek. By seeing after the land I mean I was to see that it was not trespassed on and the timber destroyed. I did what I agreed to do. As long as I stayed there I continued to hold under these people in that way. I made the arrangements as to the English survey with Henry Sharp. Sharp and Myers claimed to be the owners. I staid there from Feb'y, 1864, until March, 9 years ago (1881). Then I sold to my brother Abner and he to Prior Baird. Abner staid only one summer.

There was no house on the English survey when I first went there, but I helped Mr. Cain Ayers build one there. He knew the arrangement I had with Sharp and Myers. Mr. Myers paid me ten dollars or something like that for building that house. The Myers and Sharps acted for each other. The house I declined to let Abner have was the same one Esq. Myers paid me for building. After I moved away I left some furniture and tools in it and fastened the door with a chain and wooden key, and so held it until I turned it over to Prior Baird or one of his tenants to move into.

42 Don't know that I ever claimed to own that land or offered to sell it to anybody. I might; maybe have named to sell my possession on it. What I mean by possession is what I had a right to sell for holding it—the improvements on it. I had fenced it. I never set up any title that I owned the land; never offered to sell the land without the title.

Cross-examination:

Little Zack Campbell made the first clearing below the 300-acre tract. Henry Sharp sold to me for Laban Sharp. I reckon Henry had an interest in the English survey, but could not tell what it was; don't know that he had any interest while his father lived. He told me to fence up that part below the line before he made the deed. During all the time that I lived there till I sold to Abner, in 1881, I did not claim to own this piece of land as my own. I built a house on it and staid there until I got a chance to move. I don't remember that I tried to sell that piece of property to other people after I moved out there. I would know it if I did. If I tried to sell it to Baird I don't remember it; don't think I tried to sell it to Abner, because he and I had very little to say. I didn't make any conveyance to Myers when I sold it to him. I made him a deed for holding the house and what work was done on the place. I made a conveyance just in that way. When I sold to Abner he wanted the house I was living in, and I told him he couldn't have it; that it was mine while I held it; don't remember whether I told — it was mine while I kept it or that it was mine; don't know whether or not I claimed to everybody while I lived there that, although that piece of land was not included in my enclosure, it was my land. I claimed it just this way: that I had had it in possession long enough that it could have been mine. I was not trying

to hold it when I put my house up there. I don't know as I can tell you how I expected that possession to enure to my benefit if I was in possession for another party. It would not do it. I
43 might have claimed that I had had it in possession long enough to give me a title to it. I don't know how Zack Campbell made that improvement, nor whether he claimed it as his. I came there during the war and the fence was burned down. At that time there had been enclosed below the line three acres, or maybe more. There was no dividing fence between it and my land, and when I sold to Abner he claimed to have bought it from me. There were about 12 acres in the field, and the piece below the line was part of that field. The same season that I left there I sold to Myers. I let Mr. Myers have it and let Mr. Baird have the house for Mr. Allen, one of his tenants. After I moved away Mr. Baird was the next one to take possession. That was the next spring after Baird bought from Abner.

Re-examined:

I never claimed to own the title to that land; never offered to sell the title to anybody. The deed or writing that I spoke of was just for holding the house and what work was done on the place. Henry Sharp, with whom I made the contract, was the son and agent of his father, Laban Sharp, and usually attended to his father's business. Myers & Sharp would come over and see me about the business every once and awhile. There never was any dispute between me and Mr. Myers about their paying me for the house what it was reasonably worth. I can neither read nor write.

RICHARD JOHNSON testified:

I went and leased the English survey and lived on the possession on it. In the year 1869 I went to see Laban Sharp about it, but didn't see him, but saw Isaac Myers, one of the parties claiming it, and Henry Sharp, and I got a lease from them to go on the land and build a house and clear up some of the land and live
44 on it if I wanted to. I described to them the place I wanted. It was Flat Lick and Rock creek. I went there and cut some house logs and laid a foundation for a house, and Jehu Branham came to me and told me I was not on the right land; that it was the opposite side, on land belonging to David Sharp—"the Gravelly survey;" so I stopped work and went back to my father's and lived there with him 3 years, and then I went back and leased that land, but went into a house that was already built on the possession, and I lived there at that place three years or more, and when I left I put an old woman in possession by the name of Betsy Day, and she staid there a year and died, since which I have not had anything to do with the land. The house I moved into was built by John Jordon. Jerry Campbell lives there now. There has not been a year at a time but what I've been back there. I married John Jordon's sister, and he married mine.

Jehu Branham pretended to have a claim on the land. He showed me the line. It was like all other lines, marked with a knife.

He said he had entered it, but never had got a grant for it. He tried to sell me the land, but he had no title, and I didn't trade. He offered to warrant the title, but when I got him into close quarters he couldn't show any title. He claimed to own where I first built the house on the Gravelly survey to be his, but he never had any title.

The arrangement I made with Myers & Sharp was I was to go there, tend the land, and look after their interests—they were grazing cattle—and for them to have a place to stay when they would come over in the mountains. I was in control there for three years. I think Elihu Wilburn moved there next. I know he asked me who owned the land, and I told him it belonged to Sharp and Myers. I cited him to Henry Sharp to get leave to go there; afterwards he moved on the land.

Cross-examination:

45 At that time Jehu Branham told me that the white oak which is the corner of the Gravelly survey was also his beginning corner, and afterwards told me it was not.

I have followed the Branham lines about ¾ of a mile to the sourwood, but never have been all around. I have been all around the lines of the little patch that he said he had no grant for.

There was a marked white oak where he claimed his beginning corner to be, but it is now down. The house I went to build is not where Jerry Campbell lives, but up in the Gravelly survey, where John Jordon lives, and at that time Branham claimed that that corner was the corner of the Gravelley survey, the English survey, and his survey.

When I went there in 1869 there was no house on that side of the creek. There was a house over in the field where Branham lived before he sold the land. I didn't live there in 1869. I started a house, but went back to my father's and returned there in 1872 and staid there, I think, three years. After Bety Day died I don't know how Gaylor came in. I went there under Isaac Myers and Henry Sharp; don't think there was more than 12 or 15 acres cleared on the west side of the creek when I went there; that is the old Jehu Branham clearing. At the house I lived in there wasn't any cleared when I went there. I cleared and fenced about an acre.

Hezekiah Bruce testified:

When Jehu Branham lived on his 1,400-acre tract he showed me where his beginning corner was. It was a white oak below mouth of Flat Lick hollow, on right side of road as you go down; not over 10 or 15 steps from it; about 300 yards from the house where Branham lived and in plain view of it.

Cross-examined:

46 I know where Jerry Campbell now lives. It is on the Branham tract. I have lived in that neighborhood a great while.

Re-ex.:

The tree he showed me as his beginning corner—the line runs from there sorter southeast across the creek; up the mountain, toward Hickory.

W. R. MYERS testified:

Know the land. I knew that the Myers and Sharps claimed it. I knew Burgess here before he left the country. Some years after he left here I went out to Missouri, where he lived; had many conversations with him during that time. He never made any claim to this land or mentioned it in any way. I didn't mention it to him.

A. J. PETERSON testified:

I am a son of Joseph Peterson, one of the original enterers of this tract of land. He died in 1844. None of his children are living but me. Neither I nor any of my brothers or sisters have ever set up any claim to any of this land. My brother was county court clerk for that county many years. I think he made out the tax-lists. He also acted as county register.

Cross-examination:

I made a quitclaim deed to this land to defendants without any consideration; also one of my nephews and one niece did. I understand some refused to do so. I understand my father died before the grant issued.

J. H. REID testified:

I have seen Mrs. Burgess, the plaintiff in this case, and had a conversation with her in reference to this land in early part of 1869. I went there in search of her as attorney of the Big
47 Creek Coal Co., who have contracted to buy this land of the Sharps & Myers, to endeavor to clear up the title. I told her what I wanted. She expressed herself very freely that she had no claim upon the property and did not know anything about it; but, from being constrained by others, she did not sign the quitclaim deed which I prepared for her.

Cross-examination:

She told me she was about 80 years old. She was a well-preserved lady.

JOHN MYERS, recalled, testified:

The original grant from the State to English *et al.*, # 25338, for the land in this case, was possessed by Isaac Myers, my father; he handed it to me for the purpose of running out the land. I have had it ever since until I handed it over to my counsel.

(Def'ts' counsel here produced said original grant in evidence, which is in words and figures heretofore shown by the copy and

need not be copied again, but by consent of parties the original will be sent up with the record.)

JOHN MYERS continued:

Defendants have always paid the taxes on this land in Campbell county.

(Defendants introduced deed from Thomas Douglas to H. P. Johnson for a third interest in the land in dispute as follows:)

This indenture, made the 13th day of March, 1860, between Thomas Douglas, Sr., of the one part, and Hiram P. Johnson, of the other part, both of the county of Campbell and State of Tennessee, witnesseth:

The said Thomas Douglas, Sr., for and in consideration of the sum of three hundred dollars to me in hand paid and se-
48 cured to be paid by notes of hand under seal and of this date, the said Douglas retains a lien on said land until the purchase-money is paid, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain and sell, convey, and confirm, unto the said Hiram P. Johnson, his heirs and assigns, my undivided interest in a certain tract of land situate, lying, and being in the county aforesaid, on the waters of Big creek, and which is allotted and located as follows, to wit: Beginning on a white oak on the north side of Cumberland mountain, near George Johnson's corner of a hundred-acre survey, running thence south 45 west 380 poles to a white oak by the side of a path below Morgan's old mill; thence the same course continued 580 poles to a stake and pointers on the north side of Cumberland mountain; thence north 20 degrees west 960 poles to a black oak on the east side of Hickory creek; thence down the creek 200 poles to a large white oak on the east side of said creek; thence north 45 east 900 poles to a stake and pointers on the Rock Creek mountain; thence south 20 east 1,110 — to the beginning, containing 5,000 acres, for which the said Douglas conveys one-third, it being his undivided part of said tract or parcel of land entered in the names of Joshua English, Samuel T. Burgess, and Joseph Peterson. I covenant with the said Hiram P. Johnson that I am seized and possessed of the said land and have a right to convey it, and I warrant the title against all persons claiming under me.

In witness whereof I have set my hand and seal the date first above written.

THOS. DOUGLAS. [SEAL.]

Witnesses:
GEO. W. SMITH.
WM. TAYLOR.

STATE OF TENNESSEE, }
*Campbell County.* }

49 Personally appeared before me, John Peterson, clerk of Campbell county court, George W. Smith and William Taylor, subscribing witnesses to the within deed, who, being first sworn,

depose and say that they are acquainted with Thomas Douglas, the within-named bargainor, and that he acknowledged the same in their presence to be his act and deed for the purposes therein contained and upon the day it bears date.

Witness my hand at office this 7th day of November, 1860.

JOHN PETERSON, *Clerk.*

STATE OF TENNESSEE, }
*Campbell County.* }

REGISTER'S OFFICE, *this 2nd Day of January,* 1862.

Then were the within deed and certificate thereto annexed registered in my office in Jacksboro', in Book "O," on pages 336 and 337, and at half past ten o'clock in the forenoon.

JOHN RYAN,
*Register for Campbell County, Tennessee.*

Endorsed: T. Douglas. Deed to land. Register's fee, $1.00. Clerk's fee, 25c.; State tax, $2.02½—$2.27½. Came to hand the 2nd day of January, 1862, at half past ten in the forenoon. Ex. "I" to bill of ex.

(Plaintiff's counsel admitted that the tax deed from Russell Miller, sheriff, to John Myers, Alvis Kincaid, and Thomas Douglas, and the deed from A. Kincaid to Isaac Myers, and the deed from Thomas Douglas to H. P. Johnson, each covers the land in dispute in this case, and that all of said parties except Johnson are now dead.)

The plaintiff introduced the following witnesses and evidence in rebuttal:

WILLIAM RUTHERFORD, Jr., testified:

50 I am son of Wm. Rutherford; am familiar with that piece of land outside of that tract (shown on map at B). It was fenced there, and my father tended it and used it as his own, and when he sold the land to Abner he wanted to except that piece, and wouldn't let him have it.

He claimed it because he would not give it up to Abner. I heard him talking about selling it, but cannot recollect all that was said. He finally let Jno. Myers have it; they made some sort of a trade about it. It was something like two years after he sold to Abner. My father moved from there about last of February or 1st of March, 1881. He sold to Abner in November or December before.

I knew Mr. E. L. Wilburn. He lived at the Jerry Campbell place about two months.

Cross-examined:

I know where my father's lower line was said to be, from the beech to the gum; don't know what arrangements my father had about that piece of land below there.

I don't remember hearing him say that he claimed it as his land. He had a little house built down there, and moved into it after he sold the land. I know he told Abner it was not his. Myers' and

Sharp's cattle came, and he attended to them as anybody would do. He salted cattle for Billy Sharp. When my father lived there the Sharps and Myers claimed to own it. After my father bought the place from Labar Sharp he claimed to own the land that was above the beech and gum. I heard my father say afterwards that Myers had paid him for building the house—I understood from $10.00 to $15.00.

L. C. AYERS testified:

My father-in-law, Zack Campbell, built the first house on the possession below the Baird beech corner (on map at "B"). I couldn't tell how long before the war, nor how long he lived there—
51 maybe 30 years before the war. It was his house. I could not tell you whether he held that house as his own or as somebody else's. I do not know of his paying rent to anybody. He owned the Baird tract. I only know where his lines were by his say-so. I don't know whether he knew that his house was outside the line. He sold to Archibald Russell, who built further up on the farm and lived there three or four years. This was before the war. The next that had it, I believe, was Laban Sharp, and a man named Aaron Sharp lived on it. Don't know who lived in the old house after Russell moved further up. There was a fence around it. I don't suppose there was more than an acre or so enclosed. I reckon Wm. Rutherford set the fence out further. He lived in the house that Russell built. The old house was made away with. I was the next man that lived down there. I moved on the farm in a house that R. M. Johnson put on the same farm. This was 6 or 7 years before Wm. Rutherford sold to Abner, and Wm. Rutherford told me that they had built a house below there on the lower end of the farm, and I put a little house there and lived in it for 9 or 10 months. This was at north end of farm, outside the line marked. When I lived there I claimed as a tenant under Mr. Rutherford. While I was his tenant he said nothing to me about claiming the land under anybody else. I think the next person that lived in that house was Sarah Jordon, a sister of Amos and John Jordon. I know Jerry Campbell and the place where he lived. I think he has been there 2 or 3 years. About the time he went there he had a conversation about who he was going under. I think he went on what we call the old Jehu place. While he was there he told me he was on the place with the consent of Henry Sharp. He stated nothing more as to the grant or title than that we always call it the old Jehu place. I believe the tract has 20 acres in it, and I have known it 40 years or more.

There used to be two houses within the enclosure and just
52 outside the north line of the P. P. Baird 300-acre tract. One of these houses was there when I first knew the place. Henry Sharp was a son of Laban Sharp.

Cross-examined:

I know where the beginning corner of the Prior Baird tract is on a beach. My father-in-law never claimed to own any land except

what he bought above that line. The house I built is below that line. When I built there I went there under William Rutherford. I don't know what arrangements he had with Sharp and Myers.

I only know the location of the line between the old Jehu place and the English survey by the say-so of others and where old man Jehu Branham showed me the corner.

Re-examination:

When Jehu Branham showed me the line between his place and the English survey — crossed Hickory creek and come down and crossed about 100 yards above the Jerry Campbell place. The white-oak corner Jehu Branham showed me was between Flat Lick and the John Jordon houses. It was above Flat Lick branch.

JAMES CAMPBELL testified:

I have lived in Campbell county all my life; have helped run the lines of the Jehu Branham tract twice. The second time we ran it Mr. Stanfill was the surveyor. I don't think the lines would include the Jerry Campbell possession. The closing line back to the beginning corner ran near the old Jehu Branham house. I was thinking of buying a portion of the 200 acres which Sharp had bought of Branham. This was before the war. There was no clearing at the Jerry Campbell place at the time of these surveys; only a little patch used to be cultivated where Jerry Camp-
53 bell lives now. On the first survey that I attended we began somewhere near the Flat Lick and ran the northwest line of the 1,400-acre Jehu Branham tract, and then ran the end line and quit. I don't remember who made the survey nor who were along, but Jehu Branham was not along. The second time—several years afterwards—the- ran the northeast line and aimed to begin on the end line where we quit off before. I don't know how far the line we run would miss the Jerry Campbell place. We found we were running too far to the right and quit.

Cross-examined:

We began at Branham's beginning corner. There was no dispute about it at that time. The corner was above Flat Lick branch, not far from Flat Lick. I know where the Flat Lick branch runs into the creek at a little drain. The corner is below that bridge. In coming back to the beginning corner we ran right close by the back of the house, only a few feet from it, over to the beginning corner, a white oak. I don't know which line of his he claimed that to be, but Branham claimed it to be his line. There was no dispute about it. He was the owner of the land at that time.

I know where the Jerry Campbell house now is. As you came back home on this line that house is about 200 yards to the right or south of this line.

JOHN CAMPBELL testified:

I knew Wm. Rutherford when he lived there on his tract. I heard him talk about there being a piece of land down at the lower

end that was fenced in. He had it under fence all the time that he staid there. I heard talk of his proposing to sell it, but not from him. He claimed it as his land while he lived on it. I heard him say something about selling it to Abner, and they got into
54 some kind of a racket about it, and he came back and proposed to sell it to Mr. Baird. I heard that Mr. Rutherford did this. I did not hear him propose to sell it; that was the talk. Jehu Branham was my brother-in-law. The 200 acres that he sold to Laban Sharp lies down the creek from the beginning corner. I know that E. L. Welburn once lived on the Jerry Campbell place, but don't know under whom he claimed. There was then only a very little enclosed on that side of the creek.

Cross-examination:

I expect I have seen the beginning corner of the Baird tract. That house is below the line. As to that part below his line Wm. Rutherford claimed it by possession. He never told me what arrangements he had made with Sharp and Myers about his possessions. My recollection is that he claimed that he had had it fenced up long enough for him to hold it as his land, and that he claimed it by possession. He told me this several years ago. He stated he had lived there and had had it fenced long enough to give him the right to it. None of the Sharps nor Myers were present when we were talking about it. You know mountain men hold possession of land for the improvements they put upon it. Where Jehu Branham claimed to be the beginning corner of his 1,400-acre survey would be a little below the Flat Lick.

Re-examination:

The Jerry Campbell house is above the branch, and the corner is on the left-hand side and the house on the right-hand side. I don't know whether that will include the Jerry Campbell house or not.

ABNER RUTHERFORD:

I live in Campbell county. I bought the Baird tract from Wm. Rutherford 8 or 9 years ago. He made me a deed.

(Plaintiff reads a copy of the deed, which is in words and figures following:)

55 W. N. Rutherford
to
A. D. Rutherford.

This indenture, made this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-one, between William N. Rutherford, of the first part, and A. D. Rutherford, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of nine hundred and fifty dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents grant, bargain, sell, remise, release, alien, and confirm unto

the said party of the second part and to his heirs and assigns forever a tract of 300 acres of land, more or less, lying on Hickory creek, in Campbell county, Tennessee, beginning at a beech tree marked "M. R." on the east side of Rock creek, near the lower end of a bottom, at the foot of Rock creek mountain, then up the creek south 10 degrees east 100 poles to two white oaks and a maple at the foot of said mountain; thence south 40 degrees east 220 poles to a white oak; then crossing the creek south 50 west 140 poles to a stake; then north 40 degrees west 340 poles to a stake; thence north 10 west 100 poles to a stake; thence north 80 east 155 poles to the beginning—this deed is made in consideration of an exchange of lands of equal value—together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold said premises as described, with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the said party of the first part, his heirs, executors, administrators, and assigns, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of the presents he was well seized of the above-granted premises in fee simple; that they are free from all incumbrances whatsoever, and that he will, and his heirs, executors, administrators, and assigns shall, warrant and defend the same against all lawful claims whatsoever.

56 In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

his
WM. N. x RUTHERFORD. [SEAL.]
mark.

Signed, sealed, and delivered in the presence of—
WM. ALLEN.
JOHN HENLEY.

STATE OF TENNESSEE, }
*Campbell County.* }

Personally appeared before me, S. C. Baird, clerk of the county court of said county, William N. Rutherford, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand, at office, this 30th day of November, 1881.

S. C. BAIRD, *Clerk.*

Received for record Nov. 27th, 1882, at 2 o'clock p. m. Registered Nov. 27, 1882, at 3 o'clock p. m.

LEWIS WILSON, *R. C. C.*

STATE OF TENNESSEE, }
*Campbell County.* }

I hereby certify that the above and foregoing is a full, true, and

perfect copy of a deed of conveyance as it appears of record in my office in Deed Book "V," page 381.

Witness my hand, at office, in Jacksboro', on this 25th day of January, 1890.

LEWIS WILSON, *Register.*

Endorsed: W. A. Rutherford to A. D. Rutherford. Fee, $1.25. Ex. "J" to bill of ex.

57 ABNER RUTHERFORD continued:

When I purchased there was a little strip of land below the line enclosed with the rest. There was a house on it. When I bought Wm. Rutherford moved into that little house. He claimed to own that little piece of land in this way by possession. When I bought I thought it was altogether. There was nothing said about the little strip. I found he claimed to the contrary when I moved there. He moved into the little house in latter part of Dec'r and away from there in Feb'y or March—in the spring. From that time till I sold to Baird nobody lived there; no dividing fence was between that little strip and my 300 acres. The field included from 6 to 10 acres, including this strip. My recollection is that William had talked to this effect: He was going to hold it till he got pay for it; he had been in possession of it since about 1865. It was called 2½ or 3 acres in that little piece. After making one crop I sold to Baird—that is, I sold to Baird a year or so after I bought of William Rutherford. I know the Jerry Campbell place. James Gaylor lived there once. Elihu Welburn lived there before him. I remember Mr. Jordon lived there. He claimed to be there under Laban Sharp.

Cross-examination:

I didn't claim to have bought anything from my brother outside of my deed. I never — any land below that line. I don't know whether Wm. claimed to own the land or to hold the land by possession. He used to say he intended to hold the land till he got pay for his possessions. I don't know whether he spoke of the land or the house as being the possession he would hold till he got pay for it. He claimed to own the land by source of possession. I cannot say that he ever told me how he got into possession and whom he was claiming under more than he aimed to have pay from Mr. Myers. He bought the land—the 300 acres—from Laban Sharp.

58 I know the Jehu Branham place. He showed me what he called the Flat Lick place, and there was a corner right near the Flat Lick. I think he showed me his knife-marked line. That was right close above Flat Lick. The line ran off up the mountain to the northeast, above the Jerry Campbell house.

JAMES GAYLOR testified:

Used to live near the Big survey; know the place where Jerry Campbell lived. I went there in 1880 and lived there until 1883;

rented the place from Henry Sharp. He claimed that he or he and his father bought the place from Jehu Branham. I made three crops there. When I went there I don't think there was over an acre or an acre and a half where the house was, and there was some patches down below it a little further of not more than 2 or 3 acres across the creek. Jerry Campbell went in next. Before I went there a woman lived there; don't remember her name; don't think it was Day; it seems to me it was Cope. The place was called the Jehu place. Elihu Welburn had once lived there, but I don't remember when.

Cross-examined:

Henry Sharp claimed that he had bought 200 acres from Jehu Branham. He didn't tell me where the beginning corner was; never showed me where the lines ran between it and the English survey. I don't know what part of the land he was talking about when he said that his father bought 200 acres from Jehu Branham, nor whether he meant that the whole of the cleared portion was on the Jehu Branham tract. Sharp and Myers herded a considerable cattle there. I had an idea they claimed the Big survey. If the line of the Jehu Branham 1,400-acre tract came straight across the road and then on down that would throw the house I lived in on the English survey, but would throw the most I cultivated
59 on the Jehu Branham tract. I had no contract with Sharp about looking after cattle. I sold my land on Lick creek and expected to go West, and Henry told me to stay there as long as I pleased. The fences were in a bad condition and broken down, but I don't know how long they had been so. As I understood it, I rented it from Henry Sharp as a part of the Branham land.

P. P. BAIRD:

I own and live on the 300-acre entry sometimes called the Richardson entry. I bought it from Abner Rutherford about 8 years ago. There is a little piece fenced in with mine below my line which my deed don't cover. There was a house on it when I first went there. There were different persons claiming it. It was in the possession of William Rutherford. He proposed to sell it to me, I think, on the 4th December, 1882. I didn't buy it. I understood he finally sold to John Myers. There is no dividing fence between it and my field above it. I suppose there is some 6 or 7 acres of it. In the whole field there is from 20 to 25 acres. As far back as I know there has been no dividing fence there.

Cross-ex'd:

I am in possession of it. I put my son-in-law upon it. I let him have the lower part of the field with that I sold him off. I did not sell him any part of that, and he is now in possession of it. I got possession of it in this way from Henry Sharp and John Myers. I am holding it under them in this way. They told me to keep it and cultivate it as my own. I was to keep it up, and they told me to use any timber I saw proper to use and to notice after their tim-

ber, and I agreed I would do it. Nothing more was said about their stock than this: I frequently salt their stock and tend to them with my son, and they do the same for my stock. I do not know how William Rutherford held it. He told me that he did not have any right to the land; that Mr. Myers and Mr. Sharp among them would have to make the title. He told me that when he offered to sell it.

I am now holding possession of the house from Henry Sharp.
60 After I made the arrangements with Henry Sharp about the land I moved the house up on my own land. I understood that William Rutherford sold this land to John Myers for $10.00—that is, the same house I moved on my land. I have the land fenced up.

Re-examined:

I made the arrangement with Sharp after Rutherford sold to Myers.

A. O. JOHNSON testified:

I live in Campbell county, and have known the land in dispute ever since 1869. I knew the Jehu Branham entry and the Gravelly entry and English entry.

When I can first remember it Mrs. Jordan and John Jordan were living at the Jerry Campbell improvement, claiming under Laban and Henry Sharp, and that it was part of the 200 acres bought from Jehu Branham.

Next, Richard Johnson lived there. I think Elihu Welburn lived there next. He claimed to hold under Laban Sharp, and James Gaylor followed him, which brought it down to Jerry Campbell. I have never heard of anybody living on that land, up to the time this suit was brought, claiming to hold it in any other way than under the Branham entry.

It was always claimed that Henry Sharp and Laban Sharp bought a part of the Branham entry from him. I think the Jerry Campbell house should be a little nearer the creek bank than it shows on the map. When Mr. Welburn went there the fences were bad, part brush and part rails. When I was first acquainted with that possession there was just a little, small lot around the house that Mr. Jordan had put up. From that time until Jerry Campbell moved there the line of fence along the road was at times good, but as a general thing around the farm it was very indifferent all the time.

I reckon they made a little something of a crop there every
61 year. They had a house, and a family in it.

I made a new entry on a part of what Sharp claims was the 1,400 acres. I had a litigation with Sharp about it. I know where the white-oak beginning corner of the Jehu Branham tract is. It is where the defendants claim it to be. It is on the northeast side of the branch. It stands in the edge of the branch, and the line runs south 45 west, right up along the mountain.

Jehu Branham claimed that the line of the English survey ran under the porch of his old house to his beginning white-oak corner. He claimed that this was the line of the old English survey. I

have been down the line of the 1,400-acre survey as far as the sour-wood. If the line of that tract and the English survey run as the Sharps claimed it did, a part of the possession would be on the Branham side and a part of the possession would be on the English side. The first I ever heard of the English survey Mr. Myer told me it belonged to him or his father and a Mr. Johnson and Laban Sharp. The people that lived on it always said it was the Jehu land and that they rented from Laban Sharp. Campbell told me he went to Laban Sharp and rented the Jehu farm. In my suit with the Sharps in the chancery court of Campbell county I did not claim any part of the Branham 1,400-acre entry.

Re-examination:

There is a marked line leading from the white-oak corner east of Campbell's house, and according to that marked line the Jerry Campbell house is on the Jehu Branham side—that is, the line runs south of the house. (Witness pointed it out on the map.) There is no marked line that I know of by where the old Jehu Branham house stood, but there is a marked line down the creek to the sour-wood.

Recross-examination:

62 Just a day or so, within a week, after Gaylor left and Jerry Campbell moved in he (Campbell) told me he had rented the Jehu Branham place of Laban Sharp.

BEN. JOHNSON testified:

I live in Clay county, Missouri. My wife is the granddaughter of Jane Burgess. I have been acting as agent for the plaintiff, and have been on this land and over the lines, the first time was the last of February, 1889. I have been to the house where Jerry Campbell lives. I asked Mr. Jordan if he could show me any marked lines on the old Jehu Branham lines. He and I went together about 45 degrees southwest from this Flat Lick. We had a compass with us. Flat Lick is about half way between the houses of Jerry Campell and John Jordan. I followed the marked lines from the first marked tree, which was a white oak at Flat Lick, on that direction across the creek, where I found a poplar, and there Mr. Jordan left me, and I went on with a pocket compass as near as I could on the southwest with a little stick for a guide, and I went, I suppose, a half a mile further and found the marked double poplar. It was getting late, and I went to Mr. Baird's house. I went back some time after that and found, I think, 6 or 7 marked trees. The first trees seemed to be marked with a knife. The double poplar, I think, was marked with a hatchet or ax. All the marks were old. That first white oak was perhaps 8 or 10 steps from the Flat Lick branch, and a line run from there southwest. I found a white-oak stump in the line with the marked trees. Jerry Campbell's house and all of the old improvements were north of this line. I know Amos Jordan. When I was there last spring he told me, in company with Mr. Campbell, that he was chain-carrier under Richard Perkins when

he ran the Wiley Campbell survey, which is a part of the Jehu Branham 1,400-acre survey, and he said that one of the lines of that survey runs between the house where John Jordan lives
63 and where Jerry Campbell lives.

Cross-examination:

I found a knife-marked line there, and then went by myself out in the woods, and I suppose it was 350 yards until I found any more marks, and then I found a poplar about 50 yards further. Judging from the distance and from reading the 100 A. entry by Jehu Branham I could not reconcile this line as being the line of that 100 acres. I do not know where that line goes to. Several months afterwards I found knife-marks running up another way. I think this is the line that Jehu Branham claimed in his deed. I had a talk with him about the line of his 1,400-acre survey. He said it ran between his house and his loom-house, which stood below, perhaps 150 yards below the Jerry Campbell possession. If that line was extended it would run tolerably close to the beginning corner of the 1,400-acre survey, as claimed by the defendants. I have seen that tree. It is a white oak. It has three or four marks on this side and three on that side. If this is the true line all of the Jerry Campbell possessions would be on the English survey. I have a copy of this map of the English survey. I have never been able to find the grant upon the English survey. I have never followed the Jehu Branham 100-acre entry. If it runs along with the knife-marked lines it would be above the Flat Lick branch and would include the land above where Flat Lick runs into Rock creek.

(Plaintiff reads grant # 20070, Mark Richardson, for 300 acres, as follows:

No. 20070.

THE STATE OF TENNESSEE:

To all to whom these presents shall come, Greeting:

Know ye that in consideration of an entry made in the entry-taker's office of Campbell county, of No. 802, dated the 14th
64 day of March, 1836, by Mark Richardson, there is granted by the State of Tennessee unto the said Mark Richardson and his heirs a certain tract or parcel of land containing three hundred acres of land, lying in the county aforesaid—

On Rock creek, the waters of Hickory creek, above the Lick: Beginning on a beech marked "M. R." on the east bank of said creek, near the lower end of bottom at the foot of Rock Creek mountain, thence up the creek south three east one hundred poles to two white oaks and a maple marked "M" at the foot of said mountain, thence south forty east two hundred and twenty poles to a white oak, thence crossing the creek south fifty west one hundred and forty poles to a stake and white oak, thence north forty west three hundred poles to a stake, thence north two west one hundred poles to a stake, then north eighty east one hundred and fifty-five poles to the beginning.

Surveyed 11th July, 1836, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Mark Richardson and his heirs forever.

In witness whereof Newton Cannon, governor of said State of Tennessee, has hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, on the 21st day of [SEAL.] September, in the year of our Lord one thousand eight hundred and thirty-six, and of American Independence the sixty-first.

N. CANNON.

By the governor:
LUKE LEA, *Secretary.*

STATE OF TENNESSEE:

I, W. T. Jones, register for the land office of East Tennessee, do hereby certify that the within is a true and correct copy of grant No. 20070, from the State of Tennessee to Mark Richardson,
65 as the same appears of record in my office, in vol. 20, at page 277, Records of Land Office for East Tennessee, at Knoxville.

W. T. JONES,
*Register Land Office for East Tennessee.*

Endorsed: No. 20070. Grant from the State of Tennessee to Mark Richardson. Ex. "K" to bill of ex.

(Plaintiff reads in evidence copy of the Jehu Branham entry of 100 acres, which is — the words and figures following:

STATE OF TENNESSEE, }
*Campbell County.* }

No. 1174.

Jahew Branham enters one hundred acres of land in said county, beginning at first point of branch of my old line, running east and thence southeast and west so as to intersect my fourteen-hundred-acre entry and various courses for complement so as to include the land located.

This the 6th day of April, 1846.

JAHEW BRANHAM, *Locator.*

Endorsed: Copy of Jahew Branham entry, No. 1174, 100 acres. Ex. "L" to bill of ex.

Plaintiff here rested.

The foregoing was all the evidence introduced on the trial.

The attorneys for plaintiff and defendants admitted in open court of record that the land in litigation and recovered by plaintiff in the case is worth in value more than fifteen thousand dollars.
66 The court charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action of ejectment in which the plaintiff claims the legal title to and seeks to recover 5,000 acres

of land lying in Campbell county, Tenn. She — her title to the land as follows: On the 2nd of August, 1836, said tract of land was entered by Joshua English, Samuel Burgess, and Joseph Peterson by entry No. 843. Subsequent thereto, in 1838, said English and Burgess removed from Tennessee to Missouri, where they continued to reside till their respective deaths. On August 26th, 1845, a grant from the State of Tennessee, numbered 25338, was issued to "Joshua English and others" for said 5,000-acre tract. This grant has been read in evidence. Joshua English died in 1850, leaving the plaintiff, then the wife of said Samuel Burgess, as his sole surviving child and heir-at-law. Plaintiff's husband died in July, 1874. The court instructs you that said grants from the State of Tennessee vested the legal title to the five thousand acres of land therein described in said Joshua English only, and that upon his death said title descended and vested in plaintiff as his sole heir-at-law.

In actions at law like the present suit you can in this court look only to the legal title to the land. English in his lifetime and the plaintiff since his death may have held the legal title to the land in trust to the extent that others, as original enterers or their assigns, were equitably interested therein; but in this suit the legal title is alone looked to and considered, and such legal title is shown to be in the plaintiff under the grant introduced and the proof that she is the sole heir of the named grantee. It is not material for you to consider or determine who actually procured the grant to be issued. Its actual issuance in the shape it appears vested the legal title to the land in Joshua English, from whom plaintiff derives the same. It is suggested by counsel for defendants that English, having
67 moved to Missouri in 1838, and not having thereafter made any claim to an interest in the land under the entry, should be regarded as having abandoned his title, and that plaintiff's non-claim from 1850 to 1889 should be so treated. There is no evidence before you, gentlemen of the jury, to establish this proposition or from which you could properly deduce the fact of said abandonment. Without knowing what may have passed between English and those interested in the land who resided in Tennessee between 1838 and August 28th, 1845, the date of the grant's issuance, you would not be at liberty to infer or conjecture that English had abandoned his interest or title. The issuance of the grant in his name, by whomsoever procured, was the assertion or recognition of an existing interest and title in him at the date of the grant. As to the plaintiff's non-claim, it is shown by the proof that she did not know of her title till 1889, when she was approached by an agent of the defendants for the purpose of procuring a quitclaim of her title. Abandonment is a voluntary act, and must be attended with knowledge or information of one's rights to be effectual or operative; but, aside from this, there is no such thing known to the law as the abandonment of one's title. A party may under certain circumstances be estopped from the assertion of his title or may have his title to land defeated or divested by adverse possession for a certain period under the operation of statute of limitations, but there is no such thing as loss of title by abandonment or delay in asserting the same. So,

gentlemen of the jury, you should not be mislead by what has been said about abandonment of the plaintiff's title. She has exhibited a clear legal title to the land.

The defendants seek to defeat her title in two ways. First, they set up a tax deed from the sheriff of Campbell county, bearing date Dec. 8th, 1845, and registered in May, 1846, which it is claimed operates to divest the title out of plaintiff's father, Joshua English, and vest it in the purchasers under said sheriff's tax deed,
68 through whom the defendants derive title; and, secondly, that under claim of right and color of title they have had seven years' adverse possession of the land in controversy before the present suit was commenced, which adverse possession, under the operation of the Tennessee statutes of limitation, vested them with the title to the land. No question is raised as to the location or identity of the land in controversy. It is conceded that the tract described in the grant and in plaintiff's declaration is the same tract that def'ts claim under said tax deed and by virtue of their adverse possession.

The court instructs you that the tax deed introduced and relied on by defendants is not sufficient to show or establish title to the land; that said tax deed is null and void upon its face and inoperative to divest plaintiff's title. Its recitals are inconsistent and it fails to show a compliance with the requirements of the law in such cases; but while said tax deed is in itself a nullity so far as it purports to convey the actual title to the land to the defendants or in its operations to divest plaintiff's title, it nevertheless constitutes such color or assurance of title under the law of Tennessee and decisions of its courts as will serve to put in motion the seven years' statute of limitations in favor of defendants under an adverse possession of all or any portion of the land and a claim of title to the extent of its boundaries. In other words, said tax deed, though insufficient in itself to vest def'ts with actual title to the land, is admissible in evidence to support an adverse possession on their part under the Tenn. statute of limitations, which may ripen into a good title under the operation of said statute of limitation when a party has held seven year-' continuous adverse possession of land under an assurance of title, such as said tax deed constituted, and a claim of ownership hostile to that of the actual owner. The
69 latter, if laboring under no disability, such as infancy or insanity, is barred and the adverse possession is vested with the latter's right and title to the property. Such hostile possession must be open and continuous, without interruption, for the full period of seven years. It cannot be made out from inference or conjecture, as the presumption is in favor of the true owner. It must have publicity and continuity in its operation so as to give the person against whom it is asserted actual or constructive notice that his title is disputed and a hostile title is claimed. There must not only be a claim of title hostile to that of the true owner, but it must be supported by an actual occupation of the land or of some definite portion thereof with the assertion or claim of ownership to the extent of the lines defined by the color of title. If there is not an

actual occupation of the entire body of land in controversy and the party setting up adverse possession relies upon the occupation of a portion only under claim of title to the whole, it must be shown that the part so actually occupied was in fact a portion of the land covered by the true owner's title. This brings you to a consideration of the defendants' plea of seven years' adverse possession under claim of ownership and the assurance of title raised by said tax deed. On this defense, which presents an affirmative issue, the burden of proof, as already suggested, is upon the def'ts, and they must establish by a preponderance of testimony the truth of their plea that for a continuous, uninterrupted period of seven years before the commencement of this suit they have held adverse possession, as already defined, of all or some portion of the land in controversy. They claim such adverse possession, first, by reason of the facts, as alleged, that they herded, grazed, and salted cattle upon the land. It is conceded that the main body of the land was not enclosed by them, and that the range for the grazing and herding of the cattle was in no way defined. It is further shown by
70 the proof that other owners of cattle living in the adjoining valley were in the habit, during the same period or periods, of herding and grazing their stock upon the same lands. Under such circumstances the court instructs you that def'ts' herding, grazing, and salting their cattle upon the land would not constitute such occupation as the law means by adverse possession, and is insufficient in itself to establish the defense relied on under the statute of limitations. The claim that the def'ts were for more than seven years in the adverse possession of a few acres on the south side of the English grant, adjoining the old McCormick place, has been abandoned by their counsel and need not be considered by you.

The next claim to adverse possession is based upon def'ts' alleged occupation by tenants or persons holding for them of a few acres of the English land lying just outside of the line of the P. P. Baird 300-acre tract, which has been located and pointed out to you on a plat exhibited. The occupation of this small parcel just outside of the Baird tract, which is mainly relied on by the def'ts, was by Wm. Rutherford, and extended over a period of seven years. It is important for you to determine from the evidence the true character of said Rutherford's possession of said parcel. Was he in possession of it as the tenant of def'ts under their claim of title to the English land or did he occupy it under a claim of ownership or right of possession on his own part; and to what extent, if any, was it an existing part of the land covered by plaintiff's title during such occupation? It appears that the Baird tract was granted prior to 1840; that the title thereto was acquired shortly thereafter by Zack Campbell, who extended his fence or enclosure so as to take in a part of the little outside parcel in question and built his house thereon and lived there continuously from 20 to 30 years, as stated by the witness Ayres, who was his son-in-law. Zack Campbell sold the tract to Russell, who occupied the house on this outside
71 parcel for some time. Russell sold to Laban Sharp and Laban Sharp sold the said Baird tract, the inclosure of which took

in this small outside parcel on which Campbell had built, to Wm. Rutherford. While said Rutherford held the tract Ayers went upon this outside parcel under him and built the second house thereon, the old Campbell house having rotted down or been removed. Wm. Rutherford sold the Baird tract to his brother, Abner Rutherford, in 1881, but refused to give him possession of the small parcel outside on which Ayres had built the second house. No owner or occupant of the Baird place ever had any dividing fence between the clearing or field on said tract and the small parcel in question while holding or occupying the Baird place. Wm. Rutherford enlarged the clearing to the extent of a few acres around the house on said outside parcel, and said additional clearing was also taken into the same inclosure. Now, to the extent that said parcel of land outside of the true line was occupied and inclosed by said Campbell for the period of 20 years or more, the law will raise the presumption that said Campbell had or acquired the title thereto and that said title passed to the vendee, who subsequently came into possession thereof under and through conveyances from him down to Wm. Rutherford, so that such Campbell parcel and improvement inclosed with said Baird tract would be cut out of the English tract or grant, and the subsequent occupation thereof after the English title by operation or presumption of law had been defeated or divested would not constitute such adverse possession of plaintiff's land as to support the defense of the statute of limitations. In respect to the enlarged clearing and new improvements made by William Rutherford beyond the Campbell inclosure you must determine from the evidence how or under what claim they were made and held by him. It is not sufficient for defendants to show that said Rutherford did not himself claim said parcel of land or the enlarged clearing and
72 enclosure of the few additional acres made by him to the Campbell settlement. They must go further and establish by the evidence that he held and occupied for them and under their claim of title. Said Rutherford has given his testimony before you. What he has stated here and while in possession of said parcel of land is to be weighed and considered by you in ascertaining the character of his holding. Several witnesses have stated that while in possession he offered to sell or claimed the right to sell some right to the premises. The witness Baird states that said Rutherford told him he did not have title to said parcel, but if witness would buy him out Myers & Sharp would make title. Abner Rutherford testifies that Wm. Rutherford, after selling him the Baird tract and while still holding the outside parcel in question, told him that he intended to hold on to said parcel until he was paid for his possession. As witness understood him, he aimed to have pay therefor from the Myers. Wm. Rutherford himself states on the stand that some time after selling said Baird tract to his brother Abner he, for a consideration paid him, deeded said outside parcel of land or the improvement thereon to the defendant John Myers. He also called said transfer "a small or little written showing" to said Myers for the premises. That deed or written showing is not produced or accounted for by the def't John Myers, who, upon re-

examination, does not dispute the fact that such a paper was executed and delivered to him in about 1882. This was an important paper. It would have thrown light upon the character of said Rutherford's holding, and its non-production by def't Myer raises a presumption against the latter as to said Rutherford's having previously had possession under him and his codef'ts. An occupant of land may by virtue of his occupancy acquire what is called a possessory right to the premises, of which he cannot be deprived while continuing to remain in possession. This possessory right to premises and improvements may be the subject of sale and trans-
73 fer, and if def't Myer purchased such right from said Wm. Rutherford in 1882 or 1883 it would hardly be consistent with the idea of a previous tenancy on the part of said Rutherford under said Myers and others. The writing given by said Rutherford to said Myers would have thrown light upon this point. Its non-production raises a presumption against defendants, it not appearing that written document has been lost or destroyed. Cotemporaneous acts and declarations of parties should be carefully considered, and, when in conflict with their subsequent testimony on the witness stand, may be looked to by the jury, whose province it is to determine which is the most entitled to credence. If, upon consideration of all the facts and circumstances disclosed by the proof, the jury believe that Wm. Rutherford had a definite portion of the English grant outside of the Campbell improvement, as already stated, as the tenant of def'ts under a claim of title on their part to land in dispute, then you should find for def'ts; but if you should believe from the evidence that said Rutherford held for himself or upon a claim to possession in his own right of such parcel down to 1883, then you should, on this branch of the case, find against the def'ts and for the pl'tiff. As already explained, the burden of proof devolves upon the def'ts to show that the former and not the latter relation was the one actually occupied by said Rutherford while in possession of the premises. The next point of alleged adverse occupancy by or on behalf of def'ts is the Jerry Campbell place, as it is called in the testimony, the improvements on which consisted of a small house and a few (2½ or 3) acres of cleared land. The house upon this place was built some time between 1867 and 1870, as it appears by the testimony of Amos Jordan, who, in connection with his mother and brothers, occupied the premises for more than seven years. Jordan states that he went into possession under the defend-
ants and was to look after and salt their cattle and to protect
74 the chestnut timber from depredation and destruction. The evidence is somewhat conflicting as to whether this Jerry Campbell place was upon the English land or upon what is designated as the Jehu Branham lands. It appears that a grant of 1,400 acres was issued to said Branham in Oct., 1848, which called to commence at a white oak standing on or near the English line. Subsequently said Brannan made an entry of a 100 acres lying to the northwest of said tract, which was ripened into a grant. Branham sold off 200 acres of said land to Laban Sharp.

It is stated by one or more of the witnesses that Jehu Branham

claimed that his grant covered said Jerry Campbell place. Jordan says he took possessien of it originally as part of the English grant. The witness, A. O. Johnson, states that while the Jordans were occupying the place they claimed to be holding it under Laban and Henry Sharp as a part of the 200-acre tract sold by Branham to Laban Sharp. After the Jordans left, the place was occupied by Rec'd Johnson; then by E. L. Welburn, who, while in possession, said, as stated by witness Gaylor, that he was occupying it under Laban Sharp as a part of the 200-acre purchase of Jehu Branham. After Welburn, James Gaylor went into possession of the place. He states on the stand that he rented it of Henry Sharp, son of Laban Sharp, who told him that it was a part of the 200-acre tract bought by his father from Branham. Said Gaylor went upon the place in 1880 and left there the last of 1883. Jerry Campbell, who succeeded Gaylor, and is now in possession of said premises, has not been examined. One or more of the witnesses state that said parcel of land was enclosed by a fence, made partly of rails and partly of brush, and which was more or less down or broken in places at different times or dates. Now, gentlemen of the jury, the evidence, which the court does not undertake to review fully, must satisfy you that said Jerry Campbell place was actually a part of the land included in the English grant, and that def'ts were, by their
75 tenant or tenants, in continuous adverse possession thereof for seven years or more under a claim of ownership or title thereto as a part of said English grant. If the parties occupying the place went into possession under Henry and Laban Sharp, who claimed it as a part of the 200 acres purchased of Branham, then its occupation would not constitute adverse possession on the part of def'ts of the English tract or land as against the pl't'ff.

The burden of proof is upon the def'ts to establish the fact that this Jerry Campbell place was or is located on the English grant; that the persons occupying it were in possession of it as their tenants under their claim of title to the land covered by or included in said grant, for if the actual occupants went in and held possession under the claim of Laban Sharp or his son that the place was a part of the 200 acres bought of Branham such possession would not be adverse as to the pl't'ff's title further than beyond the actual inclosure. It is also incumbent upon the def'ts, if said parcel of land is a part of the English grant and was held for them, to show that it was kept inclosed for the period stated. It is not for the pl't'ff to prove that the fences were down or not kept up, but the burden rests upon the def'ts of establishing by the proof that a reasonable, substantial enclosure was continuously maintained for seven years prior to the commencement of the suit for the recovery of the land.

It is conceded by the pl't'ff's counsel that there are three tracts within the lines of the English grant which plaintiff is not entitled to recover. They are the Baird tract, the Cocke & Richardson grant (called the Gravelly place), and the Douglas tract of 350 acres. If you find for pl't'ff counsel will exclude those tracts from the judgment.

In rendering your verdict you will state that you find for the

pl't'ff or the def'ts, as the case may be. The court thinks of
76 no further instructions to you, and you will now retire to consider of your verdict.

HOWELL E. JACKSON,
*Circuit Judge.*

The jury having returned a verdict for plaintiff, the defendants moved the court for a new trial, and, the same having been overruled, def'ts tender this bill of exceptions, which is signed and sealed by the court and is made part of the record in this case; and plaintiff's counsel in open court acknowledged due service of the citation for a writ of error on the part of defendants in this case.

This January 7, 1891.

HOWELL E. JACKSON,
*Circuit Judge.*

We agree on the foregoing bill of exceptions and agree that the clerk may now file the same.

WASHBURN & TEMPLETON,
*Att'ys for Pl't'ff.*
HENDERSON & JOUROLMON.

Endorsed: Jane Burgess *vs.* J. L. Lindsay *et al.* Bill of exceptions. Filed Jan'y 7, 1891, by consent of parties. H. H. Taylor, clerk, by J. T. Carter, D. C.

*Decree.*

Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the court-house, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 14th day, of July, A. D. 1890—present and presiding, the Honorable D. M. Key, judge, etc.—the following proceedings were had, to wit:

THURSDAY MORNING, *November 13th*, 1890.

Court met pursuant to adjournment.
77 Present and presiding: The Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, and the Hon. D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSAY, JORDAN LONGMIRE, MARY LONGMIRE, His Wife; Frank Richardson and Wife, Elizabeth Richardson; Robert Mullins and Wife, Emily Mullins; D. P. Condray and Wife, Louisa Condray; Silas Sharp, C. W. Sharp, E. F. Wheeler and Wife, O. E. Wheeler; Wm. H. Sharp, Anna Miller, John Myers, Archibald Myers, D. F. Myers, H. P. Johnson, J. Stoddard Johnson, Trustee; Jerry Campbell, Anderson Stevens, P. P. Baird, David Baird, Wm. Walden, John Jordan, Ben. Walden, Geo. Barley, Wm. Baird, Geo. Baird, Wm. Johnson, James Johnson, and Big Creek Gap Coal & Iron Co., John Jennings.

Came the same jury as were respited on yesterday, and, having heard the argument of counsel and the charge of the court, upon their oaths say that they find the issue in favor of the plaintiff; that the plaintiff is the owner in fee and entitled to the possession of the land described in the declaration, viz., lying and being in the county of Campbell and State of Tennessee, bounded as follows: Beginning on a white oak on the north side of Cumberland mountain near Joshua English's corner of a 100-acre survey, thence south 45 degrees west three hundred and eighty-five poles to a white oak by the side of the path below Morgan's old mill; the same course five hundred and eighty poles to a stake on the north side of the mountain; thence north 20 degrees west nine hundred and sixty poles to a black oak on the east side of Hickory creek; thence north and down the creek two hundred poles to a large white oak on the east side of said creek; thence north 45 degrees east nine hundred poles to a stake and pointers on the Rock Creek mountain; thence south 20 degrees east eleven hundred and ten poles to the beginning, excepting therefrom the following tracts so far as they lap or
78 encroach on said land, viz., a tract of land covered by grant # 20070, based on entry # 802, containing 300 acres, more or less; also the land embraced in grant # 21813 on entry # 842, as corrected by decree of the supreme court, so far as the same overlaps said tract; also that part of a tract covered by grant # 20704, so far as it laps on said tract; also so much of the land embraced in a deed from Thomas Douglas to Hiram P. Johnson, dated March 13th, 1860, and registered in Book O, page- 337 and 338, in reg. office of Campbell county, as is embraced in the bounds of the tract recovered; also so much of the land as is embraced in the calls of a deed in the southeast corner of the tract recovered made by John Clark to Laban Sharp and dated January 19th, 1850, and registered in Book "T," pages 536, '7, in register's office of Campbell county; also so much of the tract as laps on the land recovered as is contained in a deed from Jehu Branham to Laban Sharp Dec. 5, 1854, and registered in Book "M," pages 502–504, being the land embraced in grant # 25338, based on entry # 843, together with ten cents damages for the detention thereof.

It is therefore considered by the court that the pl't'ff recover of the def'ts the land aforesaid and the damages and costs aforesaid, for which execution will issue and a writ of possession awarded to put pl't'ff in possession of said land. On application, a lien is declared on the land recovered in favor of Washburn & Templeton and J. E. Johnson for their reasonable fees as attorneys of pl't'ff in this case.

And thereupon the defendants came, by attorneys, and entered a motion for a new trial in this case.

Endorsed: Jane Burgess *vs.* Jonathan Lindsay *et al.* Decree. Entered on Book "L," page 54, Nov. 13th, 1890.

WEDNESDAY MORNING, *January* 7, 1891.

Court met pursuant to adjournment.

79 Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSAY *et al.*

In this cause came on for hearing the motion of the defendants for a new trial, and the court, having heard said motion, is pleased to overrule the same; and thereupon the defendants tendered to the court their bill of exceptions to the action of the court, which is signed, sealed, and filed and made part of the record in this cause.

Plaintiff's attorneys in open court waived citation and notice of writ of error in this case.

Endorsed: Jane Burgess *vs.* Jonathan Lindsay *et al.* Order entered on Book "L," page 64, Jan'y 7th, 1891.

80 Know all men by these presents that we, Jonathan Lindsay, Jordan Longmire, Mary Longmire, Frank Richardson, Elizabeth Richardson, Robert Mullins, Emily Mullins, D. P. Condray, Louisa Condray, Silas Sharp, C. W. Sharp, E. F. Wheeler, O. E. Wheeler, W. H. Sharp, Anna Miller, John Myers, Archibald Myers, D. F. Myers, H. P. Johnson, J. Stoddard Johnson, trustee; Big Creek Gap Coal and Iron Company, and Henderson and Jourolmon acknowledge ourselves indebted to Jane Burgess in the penal sum of five hundred ($500.00) dollars.

To be void if the above bondmen, Jonathan Lindsay *et al.*, shall prosecute with effect a writ of error which they have sued out from the circuit court of the United States in the northern division of the eastern district of Tennessee, at Knoxville, to the Supreme Court at Washington.

Otherwise to be in full force and effect this November 15th, 1890.

JONATHAN LINDSAY,
JORDAN LONGMIRE,
MARY LONGMIRE,
FRANK RICHARDSON,
ELIZABETH RICHARDSON,
ROBERT MULLINS,
EMILY MULLINS,
D. P. CONDRAY,
LOUISA CONDRAY,
SILAS SHARP,
C. W. SHARP,
E. F. WHEELER,
O. E. WHEELER,
W. H. SHARP,
ANNA MILLER,
JOHN MYERS,
ARCHIBALD MYERS,
D. F. MYERS,
H. P. JOHNSON,
J. STODDARD JOHNSON, Tr.,
BIG CREEK GAP COAL & IRON CO.,
By HENDERSON, *Att'y.*
HENDERSON & JOUROLMON.

Approved Nov. 17, 1890.

HOWELL E. JACKSON,
*Circuit Judge.*

Endorsed: Appeal bond. Filed Nov. 18th, 1890. H H. Taylor, clerk.

81 WEDNESDAY MORNING, *November 12th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, and the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSAY *et als.* } No. 856. Ejectment.

Came the parties, by attorney, and came also the following jury, to wit, W. T. Mitchell, W. T. Buckner, G. W. Foster, Thomas Brown, W. D. Jones, D. R. Jewell, J. E. Houston, J. B. Brabson, T. A. Hudiburg, Samuel Rorex, Samuel Smith, and J. S. Webb, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being duly elected, tried, and sworn to try the issues joined between the parties, are from rendering a verdict herein respited until to-morrow.

82 UNITED STATES OF AMERICA, }
*Eastern District of Tennessee,* } *ss:*

I, H. H. Taylor, clerk of the United States circuit court for the eastern district of Tennessee, do hereby certify that the foregoing 81 pages of typewritten matter (with interlineations with pen and ink) comprise a full, true, and perfect copy of the record, testimony, and proceedings had in the case mentioned in the caption, excepting the map marked "Exhibit A to Bill of Exceptions," the original of which is sent up with this record. Grant No. 25338 from the State of Tennessee to Joshua English & others is also sent up with the record by order of the court.

Witness my hand and the seal of the said court, at office, in Knoxville, in said district, this 4th day of June, A. D. 1891.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk,*
By J. T. CARTER,
*Deputy Clerk, U. S Circuit Court, Eastern District of Tenn.*

Clerk's fee for making transcript, $28.35.
Paid.

J. T. CARTER, *Dep. Clerk.*

83 *Citation.*

UNITED STATES OF AMERICA, *ss:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the second Monday of June, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Tennessee, northern division, wherein Jonathan Lindsay and others are the plaintiffs in error and Jane Burgess is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

HOWELL E. JACKSON,
*U. S. Circuit Judge for 6th Judicial Circuit.*

Service of this citation acknowledged this June 3, 1891.

WASHBURN & TEMPLETON,
*Atto's for Def't in Error.*

84 *Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Jane Burgess, plaintiff, and Jonathan Lindsay, Jordan Longmire, Mary Longmire, Frank Richardson, Elizabeth Richardson, Robert Mullins, Emily Mullins, D. P. Condray, Louisa Condray, C. W. Sharp, Silas Sharp, E. F. Wheeler, O. E. Wheeler, Wm. H. Sharp, Anna Miller, John Myers, Archibald Myers, D. F. Myers, H. P. Johnson, J. Stoddard Johnson, trustee; Jerry Campbell, Anderson Stevens, P. P. Baird, David Baird, Wm. Walden, John Jordan, Ben Walden, George Barley, Wm. Baird, George Baird, Wm. Johnson, James Johnson, John Jennings, and Big Creek Gap Coal & Iron Company, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of June next, in the said Supreme Court to be then and there —, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what
85 of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 12th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

H. H. TAYLOR,
*Clerk of the United States Circuit Court*
*for the Eastern Dist. of Tenn.*

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Tennessee.

Executed the above writ as commanded by transmitting to the Supreme Court of the United States a full, true, and perfect transcript of all the record and proceedings had, with all things concerning the same, in this court, together with this writ.

Witness my hand and the seal of the said court, at office, in Knoxville, this 4th day of June, A. D. 1891.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk*,
By J. T. CARTER,
*Dep. Clerk, U. S. Circuit Court, East'n Dist. of Tenn.*

86 [Endorsed:] No. 856. In the U. S. circuit court at Knoxville. Jane Burgess against Jonathan Lindsay *et als.* Writ of error. Filed 12 day of May, 1891. J. T. Carter, deputy clerk.

87 In the Circuit Court of the United States, Eastern District of Tennessee.

JANE BURGESS
*vs.*
JONATHAN LINDSEY *et al.*

In this cause we waive filing of assignment of errors in circuit court and transmitting same with the writ of error to the Supreme Court of the United States provided plaintiffs in error file proper assignment of errors in their brief, as provided by rule 21, Supreme Court of the United States.

June 2, 1891.

WASHBURN & TEMPLETON,
*Atto's for Pl'ff, Jane Burgess.*

Endorsed on cover: Case No. 14676. E. Tennessee C. C. U. S. No. 1202. Jonathan Lindsay, Jordan Longmire, Mary Longmire, *et al.*, plaintiffs in error, *vs.* Jane Burgess. Filed June 8, 1891.

Office Supreme Court, U. S.
FILED.
NOV 24 1894
JAMES H. McKENNEY,
CLERK

**CASE No. 14,676.**

156-208

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1891.

TERM No., 18[illegible]

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

JONATHAN LINDSAY, JORDAN LONGMIRE, MARY LONGMIRE, ET. AL., PLAINTIFFS IN ERROR,

*vs.*

JANE BURGESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

**Brief and Assignments of Error for Plaintiffs in Error.**

S. B. NEWMAN & CO., PRINTERS AND BINDERS, KNOXVILLE.

# Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 1202.

JONATHAN LINDSAY *et al*,
*Plaintiffs in Error*,
*vs.*
JANE BURGESS.

## BRIEF FOR PLAINTIFFS IN ERROR.

### STATEMENT OF CASE.

This is an action of ejectment by defendant in error against plaintiffs in error for 5,000 acres of land in Campbell county, Tennessee.

Plea of not guilty, or general issue.

Trial at January term, 1891, before Judge Jackson and a jury; verdict for plaintiff below; motion for new trial overruled; and judgment for plaintiff.

This writ of error is prosecuted to obtain new trial because of alleged errors in charge of the Court.

### ERRORS ASSIGNED.

Two errors to the prejudice of plaintiffs in error occurring on the trial are relied upon for a reversal.

1. The Court erred in charging the jury that the grant relied on by plaintiff below vested title to the land in her ancestor solely.

2. The Court erred in charging the jury that the tax deed relied on by defendants is void upon its face.

## I

On the first point the Court instructed the jury as follows:

"On August 26th, 1845, a grant from the State of Tennessee, "numbered 25,338, was issued to 'Joshua English and others' "for said 5,000 acre tract. This grant has been read in evidence. "Joshua English died in 1850, leaving the plaintiff, then the wife "of said Samuel Burgess, as his sole surviving child and heir-at- "law. Plaintiff's husband died in July, 1874. The Court "instructs you that said grants from the State of Tennessee "vested the legal title to the 5,000 acres of land therein described "in said Joshua English only, and that upon his death said title "descended and vested in plaintiff as his sole heir-at-law."

**Transcript p. 44.**

Plaintiffs in error insist that this was a misconstruction of the grant, and erroneous; that the grant vested the title in *three*, and at most Mrs. Burgess had title to only an undivided third, and could recover no more.

So much of the grant as is necessary to understand the question is as follows:

"*State of Tennessee to all to whom these presents shall come, greeting:*

"Know ye that, in consideration of an entry made in the "entry taker's office of Campbell county, No. 842, dated the 2nd "day of August, 1836, by Joshua English, Samuel T. Burgess "and Joseph Peterson, there is granted by the State of Tennessee

"unto the said Joshua English and others and their heirs, a cer-
"tain tract of land, containing five thousand acres, * * * *
"to have and to hold the said tract or parcel of land, with its
"appurtenances to the said Joshua English and others and their
"heirs forever."

**Transcript p. 4.**

By the rules of construction, as well as of grammar, the words "said Joshua English and others" mean said Joshua English, Samuel Burgess and Joseph Peterson. The grantees are said English and said others; and the others are identified by the grant.

1. The whole instrument is to be viewed and compared in all its parts, so that *every* part may be made consistent and *effectual*.

**Flagg vs. Eames, 94 Am. Dec. (40 Ver. 16) 363, 366.**
**Sheppard's Touchstone, p. 86.**
**Shultz vs. Young, 40 Am. Dec. 413.**
**2 Kent Com. 555.**
**Devlin on Deeds, Sec. 836 and 840.**

2. If, upon a view of the *whole* instrument, the grantee is pointed out, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English or irregular arrangement. The form is not material so the instrument identifies the grantee.

**Newton vs. McKay, 29 Mch. 1, 2.**
**Pike vs. Monroe, 58 Am. Dec. 751, p. 756**
**Devlin on Deeds, Sec. 185 & 836.**
**11 Am. & Eng Enc. of Law, p. 513.**

3. And, the *recitals* of a deed may be used to explain the meaning and intention of the parties.

**McNairy vs. Thompson, 1 Sneed, (Tenn.) 148-50.**
**1 Spence's Eq. Jur. 528, 535.**

4. He who interprets, should as far as possible put himself in the condition of the parties at the time the writing was executed. Regard must be had to the occasion which gave rise to it.

**Price vs. Evans, 26 Mo. 30.**
**Phelps vs. Bostwick, 22 Barb. (N. Y.) 314, 317.**
**II Am. & Eng. Encl. of Law, 513.**

In Tennessee, the first step towards obtaining a grant is to enter the land. And the enterers are entitled to a grant.

This entry is *recited* in the grant before the Court, and is stated to be *the consideration* moving the State to grant the land to said English and others. Certainly the State intended to grant the land to all entitled, and not to one of them only.

5. "Which" and "said" refer to the last antecedent, be it word *or clause*, to which they can properly apply, unless a common sense reading of the enactment requires a different construction.

**Sutton vs. Fenn 2 W. Bl., 847.**
**Endlich on Int. Stat., p. 582.**
**See same, pages 575-6.**
**Also see I Am. & Eng. Enc. of Law, 320.**

6. The grammatical construction of the words makes "said" an adjective relating to and qualifying equally "English" and "others."

This error in the charge was most material, because it is well settled that plaintiff in ejectment can recover only on the strength of his own title. He cannot recover for a co-tenant—who may never sue.

Moreover, part of the co-tenants had conveyed their interests to defendants.

**Transcript p. 31.**

The fact that Joseph Peterson died before the grant issued makes no difference.

The **Act of 1779, Ch. 4, sec. 4 (I Scott's Rev. 239)**, provides "that in case of death of any person who heretofore has made an entry of land, or who hereafter shall make an entry, pending the same, or before the making out the grant, his or their heirs or assigns shall have a fee simple estate in the premises, although the grant shall be made in the name of the decedent."

This is still in force and well settled law.

**Battle vs. Rawles, 2 Sneed 576.**
**Billingsley's Lessee vs. Rhea, I Tenn. 198.**

Moreover, the evidence tends to show that this grant was issued at the instance of the purchasers at the tax sale, immediately after their purchase, and went into their possession, and was obtained by them to perfect their chain of legal title; and that English et al. had abandoned the intention of obtaining a grant.

**Transcript pp. 12, 31.**

## II

Plaintiffs in error claimed the land under a tax sale made in 1845, and undisputed claim and acts of ownership for forty-four years under same.

On this point the Court instructed the jury as follows:

"The Court instructs you that the tax deed introduced and "relied upon by defendants is not sufficient to show or establish "title to the land; that said tax deed is null and void upon its "face and inoperative to divest plaintiff's title. Its recitals are "inconsistent and it fails to show a compliance with the require-"ments of the law in such cases."

**Transcript p. 45.**

We insist that this was error.

## TAX TITLE.

The land was sold under Statute of Tennessee of 1844.

So much of the Statute as is pertinent to this case reads as follows:

SECTION 1.—"That in all cases of sales for land hereafter made "for public taxes under the provisions of the laws now in force, "it shall be sufficient to make such sale valid and communicate "good title to the purcaser, that the land so sold lies in the county "in which it has been reported for non-payment of the taxes "thereon; that it has been duly reported: that an order of sale "has been awarded and that the sale of said land was duly ad- "vertised, to establish which facts the Sheriff's deeds reciting "their existence shall be *prima facie*, and all judgments or orders "of sale shall be conclusive unless the person wishing to show "the irregularity of the same can prove that the taxes were duly "paid before such judgment or order of sale was rendered."

SECTION 4.—"x x x x, and all the laws upon the subject of "tax sales shall receive a liberal construction, so as to carry out "the true object and intention of the Legislature, any law, usage "or custom to the contrary notwithstanding."

**Acts of Tenn., 1843.—4, p. 106.**

Lands held by entry were subject to taxation by Act of 1835, Ch. 13;—that part of the statute pertinent being as follows:

"All lands in this State held by deed, grant, entry, or dower "x x x x shall be subject to the payment of an annual tax,"&c.

**Caruthers & Nicholson's Statutes, p. 602.**

This was in force in 1844.

The land was condemned and ordered sold by Circuit Court of Campbell County, January 5th, 1845, for unpaid taxes of 1844; and was duly advertised and sold on first Monday of following

July, to John Myers, Alvis Kincaid and Thomas Douglas, from whom defendants regularly deraigned title.

The tax deed properly recites judgment and order of sale, advertisement and sale. By these statutes, these recitals in the deed are *prima facie* evidence of the facts. The Supreme Court of the State has construed the statutes and held "that the "validity of the judgment and order of sale could not be "impeached unless it were first shown that the taxes had in fact "been paid before the judgment of condemnation;" and that by the act of 1844, the judgment and order of sale are conclusive until it is shown that the taxes were paid.

**Henderson vs. Starritt, 4 Sneed, 470.**
**Tharp vs. Hart, 2 Sneed, 570.**
**Douglas vs. Mumford, 7 Baxter, 415.**

In this case no evidence was offered tending to prove payment of the taxes, and none to contradict the recitals of the tax deed.

Therefore, by virtue of the Act of 1844, the tax deed proves the judgment, and the judgment is conclusive evidence of the regularity of *all* the proceedings up to the judgment. And the proceedings subsequent to judgment are duly recited in the deed, which is evidence of their truth.

**Nicholson's Sup. to Statutes, p. 259.**
**2 Sneed, 569.**
**4 Sneed, 470.**

## PRESUMPTIONS OF VALIDITY.

Moreover there is a very strong presumption of the regularity of the tax proceeding in this case.

1. The tax deed was 44 years old when this suit was begun, and had been on the public records of the county 43 years. During all this period those claiming under the tax title were exer-

156-204

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**CASE No. 14,676.**

156-208

# Supreme Court of the United States.

## OCTOBER TERM, 1891.

TERM NO., ~~1202~~. 191.

JONATHAN LINDSAY, JORDAN LONGMIRE, MARY LONGMIRE, ET AL., PLAINTIFFS IN ERROR,

*vs.*

JANE BURGESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

## Brief for Defendant in Error.

HOEN BROS. & CO., PRINT., KNOXVILLE, TENN.

# Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 1202.

JONATHAN LINDSAY *et al.*,
*Plaintiffs in Error,*
*vs.*
JANE BURGESS.

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT.

The case is properly stated in brief of Plaintiffs in Error.

#### ERRORS ASSIGNED.

But two errors are assigned in the Brief of Appellants:

I.

That the Court erred in charging the jury that the

grant sued on by the Plaintiff below vested title to the land in her ancestor solely.

II.

The Court erred in charging the jury that the tax deed relied on by Defendant below is void on its face.

1. As to the first error assigned, we respectfully insist that the Circuit Judge construed the grant correctly.

The language of the grant is as follows:

"*State of Tennessee to all to whom these presents shall come, greeting:*

Know ye that, in consideration of an entry made in the entry taker's office of Campbell county, No. 842, dated the 2nd day of August, 1836, by Joshua English, Samuel T. Burgess and Joseph Peterson, there is granted by the State of Tennessee unto the said Joshua English and others and their heirs, a certain tract of land, containing five thousand acres, * * * * to have and to hold the said tract or parcel of land, with its appurtenances, to the said Joshua English and others and their heirs forever."

*Transcript, p. 4.*

A grant to be valid must be to a corporation or to some certain person named who can take by force of the grant and hold in his own right or as trustee.

*Jackson ex dem. Cooper et al., vs. Cary, 8 John., R. 385.*

"If the grant be by deed, the grantee must be *sufficiently named.*"

*Sheppard's Touchstone, 235–6.*

*Jackson ex dem. Potter vs. Sisson, 2 Johnson's cases, 321.*

The grantee must be named with *certainty*—as, if a grant be made to A. B. or C. D., it will be void as to both.

*3 Wash. R. P., 4th Ed., 266.*

A deed to John L. Saffarans & Co., for lands purchased with partnership funds, vested the legal title alone in John L. Saffarans, the grantee named, although in Equity he would be trustee for his firm.

*J. F. Moreau et al. vs. Saffaran & Co., 3d Sneed, R., page 596.*

*James M. Holms vs. Jarrett, Moon & Co., 7th Heiskell, page 506.*

2. A *Court of Law* recognizes the party named as grantee as the sole holder of the *legal* title, and if any error has been made, even though the grant has issued to A. B. when A. C. was the party intended, this can only be corrected by *scire facias*, or other proceeding in equity.

*Jackson ex dem. Houseman vs. Hart, 12 Johnson's R. 77.*

*Boothroyd vs. Engles, 23d Mich., 21.*

*Tartin vs. Faught, 23d Cal., 237.*

*Jackson vs. Rout, 18 Johnson's R., 60.*

3. The law presumes a valid assignment from the other enterers to the grantee.

This has long been the settled law in Tennessee.

*Clinton's Lessee vs. McClairn, 3 Haywood, 288.*

*Webb vs. Haley, 7 Baxter, 603–4.*

*Conn's Lessee vs. Haislip et al. 1 Swan, 31.*

And in this latter case a valid assignment was presumed, in the face of the proof that the assignment was made by a sheriff in contravention of a statute.

Hence no assistance can be had in this case by looking at the entry or names of enterers, one of whom was shown to be dead.

II.

Was the tax deed relied upon by Defendants below a nullity, as ruled by the Circuit Judge?

*Transcript, page 45.*

The deed wholly fails to show that the land was ever *reported* for taxation,

*Transcript, pages 11–12,*

and the omission is not supplied by *any* proof.

1. This Court has always recognized the binding force of the interpretation given by the highest judicial tribunal of a State to local statutes affecting title to real estate.

*Wood vs. Freeman, 1 Wallace, 398.*

Hence it is important to see what construction the Supreme Court of Tennessee has placed on the Act of June 15th, 1844.

The Act is accurately set forth in Brief of Counsel for Plaintiff in Error.

The deed complies in some respects with the provisions of the Act, but is fatallyde fective in this, that it wholly fails to show that the land was "duly reported."

This precise question came before the Supreme Court of Tennessee arising upon the same statute, and it was held that while the sheriff's deed was *prima facie* evidence of the facts it recited, yet it must recite enough to give the Court jurisdiction, and that the omission to show that the "land was duly reported" rendered the deed an *absolute nullity*.

*Hightower vs. Freedle, 5 Sneed, 313.*

*Randolph vs. Metcalf, 6 Cold., 400.*

Question of jurisdiction always open regardless of whether taxes have been paid or not.

*Williams vs. Harris, 4 Sneed, 332.*

This deed being on its face a nullity, lapse of time could not make it less so; and there has been no possession on the part of Plaintiffs in Error, on which any presumption can arise, and the authorities cited in the brief of opposing counsel have no application to this case.

Finally, the Circuit Judge was not asked to give other or different instructions to the jury, on the question of presumption, and cannot be put in error for failure.

W. P. WASHBURN,
JEROME TEMPLETON,
*Counsel for Defendant in Error.*